

***United States Court of Appeals
for the
District of Columbia Circuit***



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Brief for Appellant William A. Hines

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,281

UNITED STATES OF AMERICA

v.

WILLIAM A. HINES, Appellant

No. 23,391

UNITED STATES OF AMERICA

v.

THEODORE M. WARE, Appellant

Consolidated Forma Pauperis Appeals from Judgments of the
United States District Court for the District of Columbia

U.S. District Court for the District of Columbia
1100 Federal Bar Building
Washington, D.C. 20006

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William A. Hines

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(v)

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Brief for Appellant William A. Hines

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23, 281

UNITED STATES OF AMERICA

v.

WILLIAM A. HINES, Appellant

No. 23, 391

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v.

THEODORE M. WARE, Appellant

Consolidated Forma Pauperis Appeals from Judgments of the
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QUESTIONS PRESENTED

1. Whether probable cause existed for the arrest of appellant Hines.
2. Whether post-arrest identifications of appellant Hines at the scene of the crime shortly after his arrest, during a line-up four hours later, and thereafter by photographs taken by police, were obtained as a result of or during a period of unlawful detention.

3. Whether appellant's rights to due process of law and to the assistance of counsel were violated by the suggestivity and other circumstances of the identification procedures at the scene of the crime.

4. Whether appellant's right to due process of law was violated by the suggestivity and other circumstances of his display to witnesses in a police line-up four hours after his arrest.

5. Whether appellant's rights to due process of law and to the assistance of counsel were violated by the suggestivity and other circumstances of photograph identifications or viewings by identification witnesses.

6. Whether the Government's evidence of identifications had a clear and convincing independent basis in the witnesses' observations during the robbery, untainted by subsequent observations of appellant and viewing police photographs of him.

7. Whether the testimony of Government witnesses should have been stricken as requested because of the failure of the Government to produce Jencks statements when police reports summarizing such statements showed the likelihood of discrepancies between trial testimony and the missing Jencks statements. Whether destruction by policemen of their handwritten notes made while identification witnesses give descriptions prior to viewing a suspect is, per se, a violation of the Jencks Act and/or an accused's right to due process of law, to a fair trial, and to confront and cross-examine his accusers.

8. Whether appellant's right to a speedy trial was denied by a delay of seventeen and one-half months between arrest and trial due to factors beyond the control of appellant.

9. Whether appellant was denied a fair trial by his joint trial with two other defendants, one of whom was his brother and as to whom the Government's evidence was both de minimis and inadmissible, and the other of whom was arrested in appellant's home, was a personal acquaintance of appellant, and as to whom the Government's evidence was very strong -- including a fingerprint taken from the scene of the crime.

10. Whether appellant's right to a fair trial was denied in a substantial way by evidentiary rulings restricting the defense in important areas of inquiry while the Government was permitted wide latitude in the same areas; by the trial court's denial of defense requests for a hearing and for a jury instruction on Jencks statements; by the trial court's limitation of defense counsel to twenty minutes for closing argument after a four-day, nineteen witness trial, while permitting Government counsel more than forty-five minutes for closing arguments; and by a jury instruction stating that the police-arranged identification procedures -- challenges to which were the bedrock of the defense of appellant Hines -- were not unfair or suggestive as a matter of constitutional law.

STATEMENT PURSUANT TO LOCAL RULE 8(d)

Appellant Hines has previously been before this Court upon an appeal by the Government from an order of the District Court (Criminal No. 106-68) suppressing identification testimony. The issues involved in the previous appeal by the Government are again before this Court in the instant appeal. In the earlier proceeding in this Court the Government's

Notice of Appeal was filed on December 24, 1968, and the number of the case in this Court was 22,694. By Per Curiam Order filed April 16, 1969 this Court granted the Government's motion for summary remand. The April 16, 1969 Order indicated that Judges Leventhal and Robinson participated in rendering the remand Order.

REFERENCES TO RULINGS

On November 26, 1968 the District Court (Judge Youngdahl) entered a Memorandum and Order in Criminal No. 106-68, ordering the suppression of certain evidence. In footnote 1 of this Memorandum and Order the District Court noted that whereas a new indictment had been returned by the Grand Jury (Criminal No. 1731-68) during the time that the Memorandum and Order was being prepared, the rulings made therein (Criminal No. 106-68) would be binding at the trial under the new indictment (Criminal No. 1731-68). Following the Government's appeal from this suppression order, and the remand by this Court (No. 22,694; April 16, 1969), the District Court entered a Memorandum and Order on April 28, 1969 (filed in Criminal No. 106-68) whereby it reversed its previous Order of November 26, 1969 as to appellant Hines, and denied appellant Hines' motion to suppress identification testimony. Neither Memorandum and Order have been published. They are both contained in the supplemental record docketed herein on October 22, 1969.

STATEMENT OF THE CASE ^{1/}

On June 10, 1969, a jury found Appellant William Hines guilty of two counts of robbery (22 D. C. Code §2901). On June 27, 1969, the District Court entered a judgment of conviction and sentenced Appellant William Hines under the provisions of the Youth Corrections Act (18 U.S.C. §5010(b)). Also, on June 27, 1969, the District Court authorized appellant's appeal in forma pauperis, and entered an order permitting appellant's conditional release from custody pending this appeal. ^{2/}

1. The Arrest.

On December 18, 1967, at about 2:20 p.m., an employee of the Walshe Realty Company at 1115 Eye Street, N. W., pushed a concealed button setting off a silent alarm notifying the police that a robbery was in progress at that location (H. Tr. 267, Gov't. H. Exh.

^{1/} The Statement Of The Case is as complete as possible in order to be of aid to the Court in obtaining an overview of the major features of this appeal; however, many relevant details may be omitted at this point in the interests of brevity. To include all relevant details in a capsulized Statement Of The Case would be virtually impossible because of the complexity of the crime, the investigatory tactics employed by the police, the pre-trial proceedings including a lengthy suppression hearing, two indictments, an interlocutory appeal by the Government, further pre-trial proceedings on remand, and a lengthy trial.

^{2/} Appellant was indicted and tried with Theodore M. Ware, who was also convicted, and whose appeal is now pending in this court. The appeals of William A. Hines and Theodore M. Ware have been consolidated by this Court's Order of August 18, 1969; however, appellants are represented by different counsel and are filing separate briefs.

10). ^{3/} As the first police officer approached the scene of the crime, a look-out man entered the Realty Company office and shouted "Here come the police" to two accomplices engaged in the robbery. All three ran out the back of the office, jumped from a window, and escaped. (Gov't. H. Exhs. 17 and 18). Private Marshall Wilson heard a radio alert of this robbery in progress while in his scout car No. 27 about 3 or 4 blocks northeast of the scene of the robbery. Responding to the radio alert, Private Wilson was about two blocks from the scene of the crime when he observed appellant Hines running. Private Wilson, using his scout car as an obstacle, stopped Appellant Hines. (H. Tr. 50-53, T. Tr. 434). Although Private Wilson had no information about the robbery nor descriptions of any persons involved, and a search, or "pat-down," of Mr. Hines disclosed no weapons or fruits of a robbery, he handcuffed Mr. Hines and took him to the scene of the crime. (H. Tr. 85-87, 89-91; T. Tr. 439-49).

Before deciding to take Mr. Hines to the scene of the crime, Private Wilson used his police radio to request any descriptions which might have been available. He was told by the dispatcher that no descriptions had been obtained. At this point Private Wilson responded, "I will go down to the scene." However, while Private Wilson was taking Mr. Hines to the scene of the crime he heard a lookout description on his police radio indicating that there were three suspects, and

^{3/} Abbreviations used herein are as follows: appellant Hines (Hines), appellant Ware (Ware), Government (Gov't.), suppression hearing transcript (H. Tr.), trial transcript (T. Tr.) and exhibit (Exh.). Thus, the Government's Exhibit No. 10 at the suppression hearing, the transcription of all information about this robbery broadcast on the police radio system is cited "Gov't. H. Exh. 10".

that one wearing a blue jacket had been arrested. The two suspects still at large were described as follows: "Negro males possibly in their late teens, one had a black raincoat on and the other had a blue suit and they are bareheaded and they were last seen going out the rear of the building." (H. Tr. 55-59, Gov't. H. Exh. 10, pp. 1-2). Mr. Hines was dressed in a gray plaid, knee-length topcoat, a gray suit, and a dark wool dress hat. (Gov't. H. Exhs. 12, 18 and 19).

Although Private Wilson had received a lookout description which clearly did not match appellant Hines then in custody, and although only the suspicious circumstances of appellant Hines running on the street could justify his detention at that time, Private Wilson consummated his original resolve to take appellant Hines to the scene of the crime to obtain identifications there, if possible. Private Wilson testified that he had not yet placed appellant Hines under arrest upon reaching the scene of the crime (H. Tr. 53-55, 80), and Private Wilson's own belief that Mr. Hines was still a suspect being temporarily detained because of suspicious circumstances, and not yet under arrest based upon probable cause, is verified by Private Wilson's handwritten notes (at this time Mr. Hines was "a possible suspect in a robbery," Gov't. H. Exh. 14, p. 4), and the police understanding that appellant Hines was not arrested until after he was identified at the scene of the crime is also verified by a typewritten police report prepared later (Gov't. H. Exh. 17, para. 4, "#3 subject (look-out man), ran out the front door and was apprehended in the 1000 bl. 11th St., NW, returned to the scene and identified.

Arrested and charged was WILLIAM ALBERT HINES N-M-19 yrs., of 906 K. St., N.W. ").

2. At the Scene of the Crime.

At about the time Private Wilson was asking for any available look-out descriptions, an erroneous alert that a policeman was in trouble at the scene was broadcast on the police radio resulting in the presence of an inordinate number of police officers when Private Wilson brought Mr. Hines, in handcuffs, into the Walshe Realty Company and displayed him to those present during the commission of the robbery. Police testimony indicated that at least a dozen policemen were present (perhaps "double or triple" the number of policemen were on the scene than would usually be expected on a robbery call). Police witnesses and those present during the commission of the robbery also described the scene as being filled with "confusion," that "there was a lot of commotion," and that the victim-witnesses were emotionally upset, and at least one of them was also angry. (H. Tr. 91-94, 102, 119, 129-131, 187-188, 285, 296; Gov't. H. Exh. 2, p. 2). Mr. Hines was displayed to them less than ten minutes after the robbery occurred. (Gov't. H. Exh. 10, pp. 1-2). There was also evidence, not contradicted by the police or by the victim-witnesses, that Mr. Hines was asked to say words spoken by the look-out man ("Here come the police"), and that Mr. Hines' hat was either removed from his head or straightened on his head after one of the victim-witnesses stated that "one" of the robbers was wearing a hat. (H. Tr. 16-19, 62-63, 211-13, T. Tr. 379).

When Mr. Hines was removed from the presence of the victim-witnesses he was, for the first time, informed of his rights. After a two or three-minute interval he was again brought into the presence of the victim-witnesses for a second identification procedure. The second confrontation was explained as being "for the benefit" of Detective Sergeant Reilly of the Robbery Squad who had arrived on the scene after Mr. Hines was first displayed to the victim-witnesses. (H. Tr. 16-26, 65). All four of the Government's identification witnesses, Mr. Walshe, Mrs. Ricketson, Mr. Gateau and Mrs. Boggs, claimed to have made an identification of Mr. Hines at the scene of the crime. However, as early as the Preliminary Hearing on January 5, 1968, Mr. Gateau pointed to Mr. Ware when asked to identify the man brought to the scene a few minutes after the robbery (H. Tr. 291, 298-299). He repeated the same misidentification at trial. When asked to identify the man wearing a hat he again pointed to appellant Ware and couldn't identify appellant Hines at all (T. Tr. 194-201, 207-208). As to Mrs. Boggs, there was no indication that she could identify anyone involved in this robbery until after she viewed the colored Polaroid lineup photographs prior to her grand jury testimony. Detective Sergeant Reilly, who was in charge of the investigation of this robbery interviewed all of the victim-witnesses on the day of the robbery and who helped set up the line-up, did not know of her claimed ability to identify anyone until she saw the police photographs on the day of her grand jury testimony. Detective Reilly did not have her view the line-up, and he testified clearly at the

Preliminary Hearing, two weeks after the robbery, that she could not make any identifications. (H. Tr. 106, 117-119, 134-137). That Mrs. Boggs made no identification of Mr. Hines on the day of the crime is corroborated by her co-worker, Mrs. Ricketson, who testified that she did not know Mrs. Boggs had made an identification of Mr. Hines on the day of the crime (H. Tr. 215-17), even though she and Mrs. Boggs had a discussion of the robbery the next day when a picture of Mr. Hines and Private Wilson appeared in the Washington Daily News (Hines H. Exh. 2), a discussion generated in part by some confusion among the three women employees of the Walshe Realty Company over the names and faces of the two robbers who were inside the office. (H. Tr. 215-17, 282-83, 296-97).

3. Police Photographing and Lineup Procedures.

During the next four hours appellant Hines was processed through Police Headquarters during which time colored Polaroid photographs were taken of him, alone, and with appellant Ware, who had been arrested shortly after the robbery. These photographs were not "mug-shots" taken in the normal course of police procedures. (Gov't. H. Exhs. 12 and 19, H. Tr. 43-44, 121-126).

At about 6:30 p.m. that evening appellants Hines and Ware were placed in a line-up with four police officers and viewed by three of the persons who were present during the commission of the robbery. Although appellants Hines and Ware were 19 and 20 years old, respectively, 5 feet 9 inches in height or shorter, 140-145 pounds or less in weight, and had no facial hair (Gov't. H. Exhs. 18 and 17; H. Tr.

107; Hines T. Exh. 3), the four police participants in the line-up ranged in age from late 20s to 40, in height between 5 feet 11 inches and 6 feet 2 inches, in weight upwards from 160 to 170 pounds, three of them wore mustaches, and one of them was Private Wilson who had been viewed by the lineup witnesses four hours earlier at the scene of the crime. (Gov't. H. Exh. 11; H. Tr. 72, 99, 100; and T. Tr. 522-23).

At most, only two of the three victim-witnesses brought to view the line-up identified Mr. Hines (Mr. Gateau and Mr. Walshe). Mrs. Ricketson identified only Mr. Ware. None of them recognized Private Wilson although they had seen him twice, under dramatic circumstances, only four hours earlier (H. Tr. 200, 226-27, 234, 305), and whether Mr. Walshe identified Mr. Hines in the line-up is disputed. At the Preliminary Hearing Detective Reilly who was present during the line-up, testified that Mr. Walshe identified only Mr. Ware at the line-up (H. Tr. 114-15), and Detective Reilly repeated this testimony at the suppression hearing (H. Tr. 105). However, in an attempt to rehabilitate Mr. Walshe's claim that he identified Mr. Hines at the line-up, and not Mr. Ware, the Government relies upon a "line-up sheet" (Gov't. H. Exh. 7, Hines T. Exh. 7) which shows that the original typewritten entry that Mr. Walshe identified only "#2 Ware" was stricken out, and written in by hand is the notation that Mr. Walshe identified "#4 Hines-- Second Line up." Detective Reilly testified that he made the hand written alteration some time after the line-up (H. Tr. 114-16).

Mr. Walshe's trial testimony further cut into the Government's claim that he identified Mr. Hines at the line-up. Mr. Walshe began his testimony about the line-up by incorrectly recollecting that there were approximately eight men in the line-up, and when shown a photograph of the line-up he emphatically agreed ("Yes, sir. Yes, sir.") that the photograph "accurately and fairly" represented how the line-up appeared when he viewed it, and that he identified "the second man" in the line-up. (T. Tr. 167-69). This effort by Government counsel to solidify Mr. Walshe as an identification witness against Mr. Hines only made matters worse, however, because the line-up was rearranged after this picture was taken, and "the second man" in the line-up viewed by Mr. Walshe was Mr. Ware! (Compare Hines T. Exh. 7, showing the two arrangements of the line-up -- the second being viewed by Mr. Walshe, with Gov't. T. Exh. 2, the photograph of the line-up as first arranged and viewed only by Mrs. Ricketson).

4. Photograph Viewings by Witnesses.

On several subsequent occasions the police-government investigation file containing the Polaroid colored photographs of Mr. Hines alone, and both appellants together, and photographs of the police line-up, were shown to Government witnesses. Such viewings occurred prior to the witnesses' grand jury testimony, prior to their testimony at the suppression hearing, and at other times when the police and/or a Government attorney interviewed the witnesses. On some of these occasions the Government's alleged identification witness asked to see the pictures because of confusion and/or uncertainty (see, for example,

H. Tr. 215-16). Moreover, a newspaper photograph which appeared in the Washington Daily News the day after the robbery was viewed and discussed by the witnesses to the crime. On none of these occasions, nor on the occasion of Mr. Hines being taken to the scene of the crime for identification purposes, was an attorney of any other person not connected with the police or the United States Attorney's Office present as a witness to these critical procedures. (H. Tr. 121-26, 131-34). The critical nature of these photograph viewing sessions is aptly shown by a statement made by Mrs. Ricketson, the Government's best identification witness, in her grand jury testimony: "I can't remember the names and faces but if I see the pictures I can put the names and faces together" (Gov't. H. Exh. 2, p. 4), and by Mrs. Boggs not coming forward with her claimed ability to give identification testimony until after she viewed photographs before her grand jury testimony.

5. Judicial Proceedings.

On January 31, 1968 a fourteen-count indictment was filed (Criminal No. 106-68). The indictment charged appellant Hines with two counts of robbery, five counts of assault with a dangerous weapon, and one count of carrying a concealed and dangerous weapon without a license. This indictment did not charge appellant Hines' brother, Edward Hines. Although the appellants Hines and Ware were arraigned and counsel were appointed in February, 1968, and motions to suppress evidence of identification were filed in March, 1968, it was not until September 20, 1968 that the case was called for a hearing on the motions

to suppress. The hearing was concluded on September 30, 1968, and taken under advisement by the District Court. (Criminal No. 106-68, official docket entries).

On October 30, 1968 a new eight-count indictment was filed, adding Edward Hines, the brother of appellant William Hines, as a third defendant. This new indictment charged appellants Ware and William Hines with robbery and assault with a dangerous weapon; however, they were no longer charged with carrying a concealed and dangerous weapon without a license. The third defendant, Edward Hines, was alone charged with this offense, together with robbery and assault with a dangerous weapon. (Criminal No. 1731-68, official docket entries). From this point forward, the government's theory changed as to which defendant left a .32 calibre Iver Johnson pistol at the scene of the crime (Gov't. T. Exh. 3). Through the suppression hearing it was William Hines who was apparently charged with leaving this pistol at the scene of the crime; however, from and after the new indictment it was Edward Hines, alleged as being the look-out man, who was charged with having this pistol on the day of the robbery. (Compare Gov't. H. Exhs. 18, para. 3 and 17, paras. 4-5 with T. Tr. 169-70, 276-78).

Thereafter, in November, 1968, appellants were arraigned on the new indictment (Criminal No. 1731-68), and the previous indictment was dismissed (Criminal No. 106-68).

On November 26, 1968 the District Court (Judge Youngdahl) entered a Memorandum and Order, granting appellant Hines' motion to suppress identification testimony as to all government witnesses, on the narrow

basis that counsel was not present at the scene of the crime when appellant Hines was taken there for identifications by Private Wilson. The district court did not reach the broader questions presented at the suppression hearing relating to the basic unfairness and suggestivity of the police procedures utilized for identification purposes -- the confrontations at the scene of the crime, the lineup, and photograph viewings and discussions by the government witnesses. The district court did rule, however, that Private Wilson had probable cause to arrest appellant Hines, that the arrest took place as early as the time Private Wilson handcuffed appellant Hines, but Judge Youngdahl characterized the question of probable cause as a "close one" (Memorandum and Order; November 26, 1968; p. 8).

On December 24, 1968 counsel for appellant Hines filed a motion to dismiss the indictment, or in the alternative, for an immediate trial separate from the trial of the two co-defendants. On the same date the Government noted an appeal from Judge Youngdahl's suppression Order which ruled inadmissible all of the Government's evidence as to appellant William Hines.

While the Government's appeal was pending in this court (No. 22,694), this court decided Bobby Russell v. United States, ___ U. S. App. D. C. ___, 408 F.2d 1280(No. 21,571, January 24, 1969), holding that the absence of counsel during a fresh, on-the-scene identification confrontation was not, by itself, cause to suppress identifications made at that time. On the basis of the Russell decision the Government sought a remand of its appeal, having first obtained an indication from Judge Youngdahl that the November 26, 1968 Memorandum and Order would be reversed on the basis

of the Russell decision. Although counsel for William Hines urged this Court at that time not to remand the Government's appeal because much more fundamental questions were involved than the right to counsel at fresh on-the-scene identifications, the appeal was remanded and Judge Youngdahl reversed his prior order. Before doing so, counsel for appellant Hines urged Judge Youngdahl to make findings of fact and conclusions of law on the basic question presented dealing with the suggestivity and unfairness of the circumstances surrounding the identification procedures utilized by the police; however, without making the requested findings of fact, Judge Youngdahl merely concluded that the requirements of Stovall v. Denno, 388 U. S. 293 (1967), and cases decided thereunder, were not violated by the facts presented in this case. Judge Youngdahl did not amplify upon this conclusion, nor did he distinguish his earlier footnote discussion to the effect that the circumstances of the identification confrontations at the scene of the crime were so suggestive that they were conducive to mis-identification, and that any identifications made at that time while appellant Hines was without counsel would irretrievably taint in-court identifications during trial (Memorandum and Order of November 26, 1968, footnotes 13 and 22 together with accompanying text).

Judge Youngdahl's second Memorandum and Order reversing his prior ruling was entered on April 28, 1969; however, the trial in this case did not commence until June 3, 1969. Thus, seventeen and one-half months elapsed between the date appellant Hines was arrested and the date his trial began. Prior to and during the trial, the trial judge (Judge Pratt) ruled that Judge Youngdahl's rulings would not be inquired into further, in

spite of additional evidence emerging during trial which cast further doubt upon the validity of the arrest and police identification procedures. (Memorandum of Pretrial Conference, May 7, 1969, para. 4; T. Tr. 51). Before a jury was selected, counsel for appellant Hines renewed motions for dismissal based on the denial of a speedy trial, and for a trial separate from the other two defendants, both of which motions were denied by the trial court. (T. Tr. 13-20, 30-34). All three defendants raised motions to dismiss the indictment based upon the invalidity of the grand jury proceedings resulting in the second indictment (Criminal No. 1731-68), demonstrating that no evidence was presented to the grand jury as to any guns being used, and only the most minimal evidence relating to appellants William Hines and Theodore M. Ware. The court denied these motions (T. Tr. 6-13); however, Government counsel later voluntarily moved to dismiss the assault with a dangerous weapon counts of the indictment, which motion was granted by the trial court.

Throughout the hearing on the motion to suppress identification testimony, and throughout the trial, defense counsel attempted to obtain the handwritten police notes taken while identification witnesses were giving descriptions and other statements to the police, especially those statements given prior to appellant Hines being taken to the scene of the crime by Private Wilson. With the exception of the handwritten notes of Private Wilson which contained no such descriptions (Gov't. H. Exh. 14), all other police notes were destroyed and were not made available to the defense for purposes of cross-examination at either the suppression hearing or at trial. (See, for example, H. Tr. 92, 93, 109, 112, 115, 117, 130-31, 137,

207-208, 285; T. Tr. 171-79, 202-207, 283-96, 357-62, 368-74). The Government explained the absence of the notes on the basis that such notes are routinely destroyed by police officers after their typewritten official reports are prepared, and that, in any event, all data contained in the police notes were transcribed to the typewritten police reports (T. Tr. 287-96). However, it became irrefutably clear during the suppression hearing and during the trial that important inconsistencies existed between the official typewritten police reports and the testimony given by Government witnesses, and that none of the typewritten police reports contained any descriptions given by these witnesses to police officers prior to, during, or after the confrontation between appellant Hines and the victim-witnesses at the scene of the crime (See below, pp. 28-30 ; and Gov't. H. Exhs. 13-18).

The trial court denied the defense motion to strike the direct testimony of Government witnesses, and the trial court denied defense motions for judgments of acquittal at the close of the Government's case (T. Tr. 634-38). The only Government evidence presented to the jury as to the guilt of appellant William Hines was the identification testimony of Mr. Walshe, Mrs. Boggs and Mrs. Ricketson.

Although counsel for appellant Hines, in arguing the motion for severance, indicated that a primary basis for the motion was the intention of appellant Hines not to take the witness stand and the resulting likelihood of severe prejudice if this factor were commented upon by either Government counsel or counsel for the co-defendants [specifically citing DeLuna v. United States, 308 F.2d 104 (5th Cir., 1962)], the trial court denied

the motion for severance and ruled that none of the attorneys in the case would be permitted to comment on the failure of appellant William Hines to take the witness stand (T. Tr. 30-34). In addition to the prejudicial, guilt by association aspects of the government's evidence as to the other two defendants (including, inter alia, a fingerprint of Theodore Ware found at the scene of the crime, and immediately after discussing the fingerprint, Government counsel, during his closing argument, emphasized that Mr. Ware was arrested in Mr. Hines' home), ^{4/} during his closing argument counsel for appellant Ware made an explicit appeal to the jury to look favorably upon appellant Ware because he had taken the witness stand "* * * as you and I, if we were innocent, we would take the stand to try to exonerate ourselves * * * " (T. Tr. 878).

Other trial court rulings will be discussed later (pp. 47-50, 51-54), including the denial of a defense request for an instruction to the jury dealing with the inferences which may be drawn by them from the failure of the Government to produce handwritten notes made by police officers which qualified as Jencks statements (T. Tr. 802-805); the addition by the court on its own motion of a statement modifying the special instruction requested by the defense dealing with identification testimony and circumstances, to the effect that the circumstances of the identification confrontations at the scene of the crime and of the lineup were not unfair as a matter of

^{4/} "And ask yourselves whether it's just coincidental that at 9:06 K Street in an easterly direction minutes after advanced situation is found, Theodore Ware is wearing a black coat, all of whom at that moment, in that city, at that moment, he's in the home of William Hines minutes after this offense." (T. Tr. 853, apparent typographical errors in original transcript).

constitutional law (T. Tr. 805-19, 913); and the trial court's repeated admonition to defense counsel during the trial to cut short vital cross-examination (for example, T. Tr. 178-79, 188, 207, 391-92, 457, etc.). and by limiting defense counsel to half the time granted Government counsel for closing arguments (T. Tr. 839). The transcript of closing arguments (T. Tr. 842-88) shows that they lasted for 94 minutes (1:50 to 3:24 p.m.), exclusive of the Government's rebuttal. The arguments covered 46 pages of transcript, or about two minutes per page of transcript. On this basis Government counsel used about 36 minutes for his closing argument (18 pages; T. Tr. 843-61) and each defense counsel used about 18 minutes, in compliance with the trial court's directive (T. Tr. 861-70; 870-79, 879-88). Government counsel then used approximately 12 more minutes for rebuttal argument (six pages, T. Tr. 890-96), for a total of about 48 minutes.

6. Relief Requested

This Court is requested to rule that the Government's identification evidence against Mr. Hines is inadmissible, to reverse his conviction, and to direct that the charges against him be dismissed.

In the alternative, if any of the Government's evidence against Mr. Hines is found to be admissible and not subject to being stricken, this Court is requested to reverse the conviction of Mr. Hines and to direct that the charges against him be dismissed on the basis that he received neither a speedy nor a fair trial.

SUMMARY OF ARGUMENTS

1. Probable Cause for Arrest. The officer who used his scout car to stop appellant Hines, and who thereafter searched Mr. Hines and handcuffed him, did not have probable cause for the arrest. The only information which the police officer had was a radio alert of a robbery in progress two blocks from the point of arrest and his observation of Mr. Hines running in a general direction away from the scene of the crime and looking over his shoulder to an area which included the arresting officer's advancing scout car. The arresting officer had no information as to whether the robbery was still in progress or, if concluded, the direction of flight of the perpetrators; nor did the arresting officer have any supporting knowledge such as the number of persons involved, their race, sex or age, how they were dressed, whether they were armed or were in possession of the fruits of a robbery, or whether they had a vehicle or were on foot. After a brief exchange between the arresting officer and appellant, the substance of which is disputed as between them (the arresting officer's version being that Mr. Hines said he opened the rear door of the scout car and entered because he was tired from running), the arresting officer searched the appellant and found neither weapons nor the fruits of a robbery. Nevertheless, and the District Court so ruled, as of the time appellant Hines was handcuffed and placed in the arresting officer's scout car, he was under arrest. It is the appellant's position that he was under arrest from the moment the arresting officer "stopped" Mr. Hines by blocking his movement with the front of the scout car. The validity of this arrest must be tested by the knowledge of the arresting officer coupled with his experience. On the basis of this standard,

it is appropriate to note that the arresting officer has insisted that he did not then place appellant Hines under arrest; but rather, that the arrest did not place until "subsequently"--after the arresting officer obtained identifications at the scene of the robbery. It is appellant's position that while the arresting officer may have been justified in temporarily detaining appellant Hines on the street because of what may have been "suspicious circumstances," a valid arrest required something more by way of police knowledge linking appellant with the crime, such as a description which matched appellant. Within a minute or two after handcuffing Mr. Hines and placing him in the scout car, the arresting officer asked for and obtained a radioed description originating from the scene of the crime which did not fit the appellant. As a matter of law, therefore, and in view of the knowledge and experience of the arresting officer including his own admission that he had not yet arrested appellant, the continued custody of appellant from that time forward was invalid.

2. Fruits of Unlawful Detention. Conceding the right of the arresting officer to temporarily detain appellant Hines until receipt of an exculpatory lookout description, all evidence obtained against the appellant thereafter were the fruits of unlawful detention. This evidence includes the identifications at the scene of the crime and during the line up four hours later, and photographic identifications by eye witnesses using photographs taken by the police prior to and during the line up.

3. On-The-Scene Identifications: Due Process and Right to Counsel. Appellant's right to due process of law in proceedings against him and his right to the assistance of counsel during the critical stages of those pro-

ceedings were violated under the circumstances of the identification procedures at the scene of the robbery, procedures initiated by the arresting officer for the purpose of validating his unlawful custody of appellant. These circumstances included the failure of the police to give appellant the prescribed warnings prior to the confrontation with the robbery victims and witnesses; police knowledge of descriptions of the robbery participants which did not fit the appellant; the presence of at least twelve to fifteen police officers crowding into a small real estate office at the moment of confrontation therein between appellant and the victims of the robbery, the appellant in handcuffs and held by the uniformed arresting officer and the victims of the robbery in an excited emotional state; uncontradicted evidence that confusion and disorganization permeated the atmosphere as evidenced by a police decision to conduct a second confrontation a few minutes later after even more police officers arrived upon the scene; the absence of any attorney or other impartial witness who was neither a victim of the robbery nor a police officer; the absence at trial, due to destruction by police officers, of the notes and memoranda made by police officers prior to the identification confrontations while the robbery victims were giving descriptive details about the robbery; and the availability of a police line up within four hours as evidenced by a line up actually conducted and viewed by the Government's identification witnesses. These police-arranged confrontations at the scene of the crime were so suggestive to the potential identification witnesses, so ill-timed in terms of the affective state of these witnesses, so disdainful of appellant's right to deliberative proceedings with the presence of a trained advisor-observer such as an attorney, so unneces-

sary, and so dramatic in effect upon these witnesses, as to constitute a substantial and irretrievable deprivation of appellant's right to due process of law.

4. Line Up Identification: Due Process. Appellant's right to due process of law was again violated by his display, in a police line up four hours later, to the same witnesses who allegedly had already identified him. The line up was highly suggestive in that there were gross disparities in age, height and weight between the two suspects (appellants herein) and the four police participants--three of whom also had mustaches and one of whom was the arresting officer who was viewed by these same witnesses when he held appellant by the arm at the scene of the robbery only four hours earlier.

5. Photographic Identifications: Due Process and Right to Counsel. Mr. Hines' right to due process of law in proceedings against him, and his right to the assistance of counsel during critical stages of those proceedings, were again violated through repeated viewings by identification witnesses of photographs of appellant taken by police prior to and during the line up, such photograph viewings occurring prior to the witnesses' testimony before the grand jury, before their testimony at a hearing on appellant's motion to suppress identification testimony, and on several other occasions when the police and/or an assistant United States Attorney interviewed these alleged eye witnesses in preparation for grand jury or court testimony and displayed these photographs to these witnesses or permitted them to view the photographs upon request by the witnesses. At least two of the Government's witnesses (Mrs. Boggs and Mrs. Ricketson) admitted that the photograph viewings were necessary prerequisites for their in-court identifications.

6. No Clear and Convincing Independent Bases for Tainted Trial Identifications. The Government did not demonstrate by clear and convincing evidence that the eye witness in-court identifications to the jury (the only evidence against appellant Hines) were solidly based upon the witnesses' observations during the commission of the robbery and untainted by their repeated observations of appellant, and photographs of him, after his arrest under dramatically suggestive police-arranged circumstances.

7. Jencks Statements. The trial testimony of alleged eye witnesses elicited on direct examination by the Government should have been stricken as requested because of the failure of the Government to produce the handwritten notes and memoranda containing substantially verbatim descriptions and other statements given by these witnesses to police officers prior to the police-arranged identifications of appellant at the scene of the robbery. The summary police reports which were available to the defense were contradictory and indicated that the handwritten notes contained critical discrepancies from the trial testimony of the Government's identification witnesses. In a criminal case where the basic issue is the identification of the accused, destruction by policemen of their hand-written notes made while identification witnesses are giving descriptions of the perpetrators of the crime is, per se, a violation of the Jencks Act, the defendant's right to due process of law, to a fair trial, to favorable evidence in the Government's possession, and the right of an accused to confront and cross examine his accusers.

8. Speedy Trial. Appellant's right to a speedy trial was denied by a delay of seventeen and one-half months between arrest and trial due to factors beyond the control of appellant. The delay resulted in the repeated

inability of police witnesses and eye witnesses to answer relevant defense questions on cross examination by the defense, and may have contributed to the destruction of Jenck's statements by policemen.

9. Prejudicial Joinder of Defendants. Appellant was denied a fair trial by the prejudicial joinder of defendants. The District Court should have granted his request to be tried separately from one defendant who is his brother and as to whom the Government's evidence was both inadmissible and so insubstantial as to raise the presumption that the adding of the brother as a defendant by a second indictment ten months after the arrest of appellant was calculated to produce in the juror's minds an inference of guilt of the appellant by association with his brother. Appellant's right to a fair trial free of avoidable and excessive prejudice was also denied by a joint trial with the other defendant (appellant Ware) as to whom the Government's primary evidence was very strong--a fingerprint taken from the scene of the crime, and evidence that the defendant Ware was arrested in appellant's home and was a personal friend of appellant, factors which gave rise to the same improper inference of guilt by association. This prejudicial joinder of defendants was further exacerbated by a statement in the closing argument by counsel for defendant Ware which drew attention to the fact that Mr. Ware had testified in his own behalf and which asked the jury to consider Mr. Ware in a favorable light because he testified, and which, by implication, focussed the jury's attention in an unfavorable way upon appellant Hines since he was the only defendant who exercised his right not to testify at the trial.

10. Trial Fairness. Appellant's right to a fair trial was denied in a

substantial way by the trial judge's inconsistent rulings on evidentiary questions by denying to the defense the right to question witnesses about subjects which the Government was permitted to explore and which went to the central factual issue of descriptions given by eye witnesses and broadcast on the police radio prior to the appellant being brought to the scene and viewed by them. Appellant's right to a fair trial was also denied in a substantial way by the Court's denial of the defense request for a hearing on the existence or destruction of police notes which qualified as Jencks statements and the reasonableness of the justification proffered at the Bench by the Government. Appellant's right to a fair trial was further denied by the refusal of the Court to give a requested jury instruction dealing with the Government's non production of Jencks statements. The instruction would have explained to the jurors their right to draw inferences adverse to the Government due to the destruction by the police of their notes, the discrepancies between later-prepared police reports allegedly summarizing those notes and eye witness testimony dealing with the same subject matters, and the relative merits of the Government's justification for its inability to produce the notes. Mr. Hines' right to fair trial was also substantially denied by the time limits for closing arguments imposed upon defense counsel. Defense counsel requested at least thirty minutes due to the length and complexity of the trial (four long days and nineteen witnesses), but the Court permitted only twenty minutes. Government counsel, however, was permitted more than forty-five minutes for closing arguments. Such a grossly unequal allocation of time was unfair as such and had the likely additional effect of raising a doubt in the minds of the jurors as to whether defense

counsel had much to comment upon in terms of weaknesses in the Government's evidence and the strength of evidence favorable to appellant Hines. Finally, and of great prejudice, was the trial court's objected-to instruction to the jury that, as a matter of constitutional law, the police-arranged identification procedures were not suggestive or unfair -- cutting the heart out of the defense case that, as a matter of fact, these procedures were impermissibly suggestive and irretrievably tainted the testimony of the Government's witnesses.

Theory of the Case.

The theory of this case which has been pursued on behalf of appellant Hines since the day he was arrested over two years ago is that two of the victim-witnesses, Mrs. Boggs and Mrs. Ricketson, momentarily glimpsed the look-out man as he ran through the Walshe Realty Company office yelling that the police were coming. Both Mrs. Boggs (H. Tr. 271) and Mrs. Ricketson (H. Tr. 221) gave identical testimony at the suppression hearing that the look-out man was seen briefly by them and that he was dressed in a "dark hat and dark coat." Less than ten minutes later, when the victim-witnesses were confronted with Mr. Hines, in handcuffs, and dressed in a gray overcoat and gray hat, these emotionally-upset robbery victims, in the midst of unusual commotion and confusion, resolved all doubts in favor of what they thought was cooperation with the police. They identified Mr. Hines as one of the robbers.

Evidence abounds that the victim-witnesses first identified Mr. Hines based on what two of the women saw of the look-out man:

A. The outer clothing worn by the look-out man was similar to

that worn by Mr. Hines when he was brought to the scene.

B. Only one of the three robbers was wearing a hat. This is a crucial fact, and it is corroborated by the testimony of Officer McFarland, the first officer to arrive on the scene, who got a look at all three robbers as they made their escape from the alley behind the Walshe Realty office, and by the initial look-out description broadcast on the police radio. Both sources clearly indicate that at least two of the three robbers were bare-headed.

C. However, from and after the time the victim-witnesses viewed Mr. Hines in the custody of Private Wilson, in handcuffs and wearing a hat, each of them relied upon "the hat" as the single most important factor in their claimed identification of Mr. Hines as one of the two robbers who was inside the realty company office during the robbery, raising the clear implication that clothing, and not facial or other physical characteristics, was their point of primary reliance (hearing and trial transcript, passim).

D. A police report prepared on the day of the robbery (Gov't. H. Exh. 17) actually described Mr. Hines as the look-out man ("#3 subject").

E. Another police report prepared on the day of the offense (Police Department Form 251, Hines T. Exh. 3) described the look-out man as follows: "Negro male, 19 yrs. of age, about 5' 8" tall and wearing dark clothing," a description similar to the appearance of Mr. Hines when he was presented at the scene of the robbery for possible identifications.

F. Another police report prepared on the day of the robbery (Gov't. H. Exh. 18) indicated that Mr. Hines was the robber who left the .32 calibre Iver Johnson pistol at the scene; however, the Government's

theory at trial was that the look-out man left this weapon in a chair at the scene of the crime.

G. When Mr. Hines was brought to the scene he was asked to repeat the words said by the look-out man when the warning was shouted.

H. During the suppression hearing Mrs. Ricketson volunteered that she knew full well that the theory of the case on behalf of Mr. Hines was that he was being misidentified as the look-out man:

" * * * I understand that they are trying to say that the third man was brought for identification but the third man was not brought for identification. "
(H. Tr. 220).

Mrs. Ricketson's insistence on this point is instructive because she repeatedly testified that she did not see the look-out man's face and couldn't identify him under any circumstances [Gov't. H. Exh. 2, p. 4 (grand jury testimony); H. Tr. 221].

I. During all of the testimony of the alleged eyewitnesses during the suppression hearing and trial there was never a reference to one of the robbers being dressed in a blue suit -- a feature so notable that both Officers Wilson and McFarland emphasized this factor to the exclusion of all others in describing a person seen in the alley behind the real estate office and emerging from the alleyway on K Street. This curious omission by each and every alleged eyewitness is understandable, however, when it is considered that by identifying Mr. Hines as being one of the two robbers inside the store during its commission wearing a hat and a dark overcoat, and the same description being given for the look-out man, they had to avoid any reference to a robber in a blue suit or their whole house of cards would collapse.

ARGUMENTS

1. APPELLANT HINES WAS ARRESTED WITHOUT PROBABLE CAUSE.

An arrest without a warrant must satisfy the Fourth Amendment's standard of probable cause. This requirement must be met before detention begins, and cannot be fulfilled by evidence obtained as a result of the detention. Beck v. Ohio, 379 U. S. 89 (1964); Henry v. United States, 361 U. S. 98 (1959); Johnson v. United States, 333 U. S. 10, 16-17 (1948). Evidence obtained as a result of an unlawful detention can be used for no purpose, including the establishment of probable cause to retroactively validate the arrest. Davis v. Mississippi, 393 U. S. 821 (1969); Sibron v. New York, 392 U. S. 40, 63 (1968); see also Wong Sun v. United States, 371 U. S. 471 (1963). To support an arrest without a warrant, the arresting officer must be able to point to objective facts and circumstances known by him that a crime has been committed and that the person arrested committed it. Police "hunches," "suspicions" or "good faith" can not substitute for the concrete facts that the constitution requires. Beck v. Ohio, *supra*, at 91, 95 and 97; McCray v. Illinois, 386 U. S. 300, 304 (1967); Brinegar v. United States, 338 U. S. 160, 175-76 (1949); Carroll v. United States, 267 U. S. 132, 162 (1925); Director General v. Kastenbaum, 263 U. S. 25, 28 (1923).

Before trial, the District Court ruled (Memorandum and Order, November 26, 1968, pp. 4-5, 7-10) that Mr. Hines was arrested when he was handcuffed on 11th Street, citing Miranda v. Arizona, 384 U. S. 436, 444 (1966); Bailey v. United States, 128 U. S. App. D. C. 354, 357, 389 F2d 305,

308 (1967); and other authority in the District Court. However, before reaching the "facts and circumstances" within the knowledge of Private Wilson at the time of the arrest it must be settled when the arrest actually took place. Mr. Hines was actually under arrest when Private Wilson dramatically maneuvered his scout car into an odd angle on 11th Street and came to a halt with its front end blocking Mr. Hines' forward progress. Private Wilson's transcribed statement on his police radio while observing Mr. Hines, "I have him here now. I will try and stop him and talk to him" (Gov't. H. Exh. 10, p. 1); his handwritten notes, "I pulled the scout car up to a parked car and blocked his passage" (Gov't. H. Exh. 14, p. 3); and his testimony at the suppression hearing, "I pulled my scout car and blocked his path" (H. Tr. 51), all indicate that Private Wilson had, at this point, "focused" on Mr. Hines as a suspect, and that, whether or not Mr. Hines was actually in custody, he was "deprived of his freedom of action in a significant way." Miranda, supra, 384 U. S. at 444; see also Escobedo v. Illinois, 378 U. S. 478 (1964).

Moreover, the Bailey case cited by the District Court indicates that Mr. Hines was actually under arrest before he entered the scout car and engaged in a brief but ambiguous conversation with Private Wilson. In Bailey the Government conceded that probable cause had to exist for an arrest in that case when the arresting officers approached the car containing suspects, a car for which they had a description linking it with the crime under investigation.

However, assuming for purposes of argument that probable cause standards need not be applied until the time Mr. Hines was handcuffed, or

even until the time Mr. Hines was about to enter the scene of the robbery for Private Wilson's purpose of obtaining identifications, it is clear that probable cause did not exist until after the detention of Mr. Hines was used to obtain identifications of him.

The Government's evidence purportedly establishing the existence of probable cause for the arrest of Mr. Hines at the time he was handcuffed does not meet probable cause standards:

1. Private Wilson claimed he first saw Mr. Hines and a man in a blue suit on the south side of K Street, between 11th and 12th Streets, near an entrance of an alley that connects through to the Walshe Realty Company; however, Officer McFarland's trial testimony was clear that only a man in a blue suit ran north in that alley toward K Street and that the two other fleeing robbers took an escape route via Eye Street and east to 11th Street. (H. Tr. 50-53, 81-83).
2. Private Wilson claimed that Mr. Hines was running only about five feet behind the man in the blue suit; however, Officer McFarland's trial testimony made it clear that if Mr. Hines was one of the robbers, his elapsed time in reaching the intersection of 11th and K Streets would have been much longer than that of the man in the blue suit because of the more indirect route Mr. Hines would have followed and because of delays caused by breaking through a fence and through a locked door

onto Eye Street. (T. Tr. 466-73; 485-86; Gov't. T. Exhs. 5 and 13).

3. Private Wilson claimed that the two men he saw were looking back over their shoulders toward the scene of the crime when he first saw them (H. Tr. 51); however, he later admitted that he didn't see them until after they had crossed K Street and were on 11th Street, and that he didn't see them look back until after they were on 11th Street (H. Tr. 89).

4. Mr. Hines' uncontradicted testimony earlier in the suppression hearing established that he was running north on 11th Street when he saw Private Wilson's advancing scout car and that he did look back over his shoulder toward K Street, but that there were sounds of loud police sirens in that direction, that he lived in this neighborhood and that with regard to running from the sounds of police cars "It's not my practice but I do run, " that he was intently watching Private Wilson's scout car which was advancing from behind Mr. Hines and appeared to be chasing him, and that Mr. Hines got into the scout car because he thought Private Wilson wanted him to (H. Tr. 4-8, 37, 47).

5. The District Court, in finding probable cause relied heavily upon "what appeared to be the submission of a fleeing criminal" although "the act of submission may have been ambiguous" (Memorandum and Order, pp. 9-10). The

act of submission was Mr. Hines' reflex decision to get into the scout car which had chased and stopped him, coupled with his ambiguous answer to Private Wilson's questions, that he got into the car because he was "tired of running."

While the foregoing may have justified a reasonable and prudent police officer in temporarily detaining Mr. Hines pending the receipt of some information about the robbery, such as tentative or partial descriptions linking Mr. Hines to the robbery, it is submitted that the arrest of Mr. Hines on 11th Street was based on suspicion and an inarticulate hunch of Private Wilson, an arrest which must be condemned for lack of probable cause.

This arrest is clearly within this Court's prohibition of arrests of "suspicious acting" persons for investigation. Gatlin v. United States, 117 U. S. App. D. C. 123, 326 F.2d 666, 670-71 (1963); Bailey v. United States, supra. (See also United States v. Valentine, 202 F. Supp. 677 (E. D. Tenn., 1962) and Cochran v. United States, 291 F.2d 633 (8th Cir., 1961), where other arrests on the basis of "mere suspicion" were struck down as being without probable cause).

Contrary to this Court's ruling in Bailey, that "the police here were obviously quite sure that they had the right man" and that there was "no suggestion of a roundup of innocent 'suspects' following the robbery" (389 F.2d at 309), Private Wilson was obviously not certain that Mr. Hines had taken part in the robbery until after he was identified at the scene of the robbery:

1. Private Wilson's handwritten notes made that day show that he considered Mr. Hines only a "suspect;"
2. Private Wilson's testimonial insistence that he did not arrest Mr. Hines on 11th Street;
3. Mr. Hines was not given the standard warnings until after he was identified at the scene;
4. A typewritten police report stated that he was not arrested until after he was identified at the scene;
5. Before taking Mr. Hines to the scene Private Wilson used his radio to ask if any descriptions were available and got a negative reply; and
6. While enroute to the scene of the robbery he obtained the first description originating from the scene indicating that the robbers were bareheaded and dressed in a blue suit and a black raincoat. Mr. Hines was wearing a distinctive hat and a gray plaid, knee-length overcoat.

Private Wilson's justification for stopping and talking to Mr. Hines because of the suspicious circumstances of Mr. Hines running in a general direction away from the scene of the crime, his submission to being stopped, and the ambiguous conversation with Private Wilson are not "objective facts" or "reasonably trustworthy" specific justifying information linking Mr. Hines to the crime. Not only did Private Wilson not have any descriptive information linking Mr. Hines to the crime, his uneasiness about not having such information is made clear by his use of the police radio requesting such information.

It is submitted that, as a matter of law, at least by the time Private Wilson obtained a lookout description while he was enroute to the scene of the crime which clearly did not implicate Mr. Hines, whatever justification Private Wilson had for a temporary investigatory detention short of an actual arrest was then rendered nugatory by the exculpatory descriptions which he obtained on his radio. His action in then taking Mr. Hines to the scene of the crime to obtain identifications in order to retroactively validate his arrest of Mr. Hines was illegal police bootstrapping at its worst.

As a matter of law this court has held in Bailey v. United States ____ U. S. App. D. C. ____, 416 F. 2d 1110 (No. 21,428, March 7, 1969) that

"we no longer hold tenable the notion that 'the wicked flee when no man pursueth, but the righteous are as bold as the lion' (fn. omitted)

* * *

"It is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witness" (citing Alberty v. United States, 162 U. S. 499 (1896).

Flight without pursuit can not be ascribed to Mr. Hines (sirens in the neighborhood and Private Wilson's advancing scout car), and his instant submission to Private Wilson is more a sign of cooperation than of flight. See also Austin v. United States, ____ U. S. App. D. C. ____, 414 F. 2d 1155 (No. 22,044; May 27, 1969) and cases acted therein noting the inherent ambiguity of flight, the lack of probative value of evidence of flight, and limitations upon jury instructions as to flight because of its complexity and the variety of possible motives for apparent flight other than guilt of the

actual crime; and Hinton v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 22,068, 10/14/69), which discusses flight as a possible "additional" factor in establishing probable cause for arrest, but only if it is "coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime" ^{5/} (citing Sibron v. New York, supra, 392 U.S. at 66-67).

In view of the subsequent facts (invalid investigatory arrest and the resulting detention used by the police to create a case), who can blame Mr. Hines for running away from the sounds of intense police activity? Is there any doubt that he or any other person would do precisely the same thing under the same circumstances if this kind of investigatory dragnet arrest is accepted by this Court?

^{5/} Specific knowledge such as "a Negro male, dark skinned, with a heavy mustache" and driving a "U-Haul van-type truck" as was the descriptive information known by the arresting officers before they stopped and eventually arrested several suspects in the recent case of Coleman v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (Nos. 21,804, 21,805, 21,806 and 21,856; 11/28/69).

2. APPELLANT HINES WAS ILLEGALLY DETAINED
AND HE SHOULD NOT HAVE BEEN TAKEN TO THE
SCENE OF THE CRIME.

The United States Supreme Court and this Court have repeatedly held that exhibition of a lone suspect to witnesses for identification should be avoided, especially if there are no exigent circumstances, and certainly if a line up can be arranged without too long a delay. Clemons v. United States, ____ U. S. App. D. C. ____, 408 F.2d 1230 (en banc 1968), cert. denied, 394 U. S. 964 (1969); Russell v. United States, ____ U. S. App. D. C. ____, 407 F.2d 720 (1969), cert. denied, 395 U. S. 928 (1969); Jackson v. United States, ____ U. S. App. D. C. ____, 412 F.2d 149 (No. 21,327, 2/3/69) and Stewart v. United States, ____ U. S. App. D. C. ____, F.2d ____ (No. 20,893, 2/10/69). The strong judicial distaste for the one-man "show-up" can only be excused under the kind of exigent circumstances presented in Stovall (the crime victim was nearing death) because

"It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." Stovall, supra, 388 U. S. at 234.

The Government has shown no exigent circumstances in this case which would require an immediate confrontation with identification witnesses at the scene of the crime. This factor, taken together with the availability of a line up later that day, Private Wilson's substantial doubts as to whether Mr. Hines was involved in the robbery at all, the absence of any attorney or other impartial observer-witness to the identification procedures at the scene of the crime, the destruction of all police notes showing descriptions given before the confrontation, and the commotion

and confusion permeating the atmosphere at the scene establish a strong prima facie case of suggestivity and the lack of justification for the confrontation and place a heavy burden on the Government to justify this identification procedure and to demonstrate that the confrontation did not irretrievably taint all subsequent testimony by the witnesses who viewed Mr. Hines at the scene.

The justification usually put forth by the Government, and which has been put forward in this case, has two parts: (1) the desirability of freeing a suspect immediately, without detention at police headquarters, if witnesses can not identify him at the scene; and (2) prompt identification procedures are favored rather than procedures arranged at a later time when witnesses' memories may begin to fade. This argument has admittedly been upheld by this Court on many occasions, although carefully and reluctantly in view of the Supreme Court's general prohibition of such a procedure (See, for example, Russell v. United States, supra). In those cases where such confrontations were at issue, this Court invariably found that the action of the police in taking the suspect to the scene for such a confrontation, when excusable, was excusable in light of (1) detailed descriptions obtained from the crime victim(s) and in the possession of the police matching the suspect with the perpetrator, or (2) uninterrupted surveillance by the victims, witnesses, or the police from moment the crime was committed until the suspect was presented for the confrontation. Several examples follow:

Wise v. United States, 127 U.S. App. D.C. 279 , 383 F.2d 206 (1967; one of the victims never lost sight of the suspect from the place of the crime to the place of arrest);

Kennedy v. United States, 122 U.S. App. D.C. 291 , 353 F.2d 462 (1965; suspect seized by two witnesses when he ran out of a house from which the witnesses had heard screams);

(Alexander) Patton v. United States, _____ U.S. App. D.C. _____, 403 F.2d 923, (1968; probable cause for arrest based on description given previously by victim);

Clemons v. United States, _____ U.S. App. D.C. _____, 408 F.2d 1230 (1968) cert. denied, 394 U.S. 964 (1969) (Mrs. Parker not permitted to give identification testimony as to an appellant named Hines in that case -- she had not been able to give a description; see also separate opinion of Judge Wright who would not permit Mrs. Steele to testify because of her faulty description of the same appellant therein); Clark v. United States (joint opinion with Clemons, supra; victim and witness gave explicit descriptions prior to viewing photographs and prior to station house identifications);

Russell v. United States, supra; witness went to a police station and gave a description on the basis of which Russell was arrested and brought to the scene for the confrontation);

(Tyrone R.) Young v. United States, _____ U.S. App. D.C. _____, 407 F.2d 720 (No. 21,504, 1/24/69; robbery victim called the police and gave a detailed description on the basis of which Young was arrested and brought to the victim);

United States v. Willie Lewis Allen, _____ U.S. App. D.C. _____, 408 F.2d 1287 (Nos. 22,662 and 22,663, 1/30/69; in requiring the defendant to appear for investigatory line ups, defense counsel must be provided with descriptions of the suspect, if any, which the witnesses had given the police);

(Sammie) Jackson v. United States, supra, ("Finally, both victims had given descriptions of the robber to the police immediately after the crime.")

(James L.) Stewart v. United States, supra, (victim gave description to police prior to arrest and confrontation);

Soloman v. United States, _____ U.S. App. D.C. _____, 408 F.2d 1306 (No. 22,155, 2/12/69; witness had suspects under surveillance until police arrived who gave chase, apprehended the suspect, and brought the suspect to the witness for identification);

Macklin v. United States, ____ U. S. App. D. C. ____, 409 F.2d 174 (No. 21,377, 2/18/69; prior to the arrests and confrontation the victim gave a detailed description including the fact that the two robbers were shirtless and were of markedly different heights); and

Sera-Leyva v. United States, ____ U. S. App. D. C. ____, 409 F.2d 160 (No. 20,619, 2/18/69) where this Court stated:

"It happens that we do not have evidence in the record of a detailed description by the identifying witness prior to the confrontations in issue. Compare Clark v. United States, supra, (citing the Clemons-Clark-Hines opinion) where one of the factors establishing independent source for witness Jones' in-court identification was his recollection of the 'robber's distinctive physical appearance'. " (409 F.2d at 163).

Thus, in the absence of any exigent need for on-the-scene identifications of Mr. Hines (except, perhaps, as an attempt to validate an illegal arrest), the availability within four hours of a line up, the absence of counsel, and the lack of any descriptive information linking Mr. Hines with the robbery (the available information was to the contrary), this identification procedure was illegal and the mere fact that it was conducted violated Mr. Hines right to be proceeded against by due process of law -- without reaching the question of whether it was impermissibly suggestive under the circumstances. Moreover, it was also void, ab initio, because it was conducted as a result of an illegal arrest and therefore during a period of illegal detention. Wong Sun v. United States, 371 U.S. 471 (1963).

3. THE POLICE-ARRANGED IDENTIFICATION PROCEDURE AT THE SCENE OF THE CRIME WAS IMPERMISSIBLY SUGGESTIVE AND VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO THE ASSISTANCE OF COUNSEL DURING A CRITICAL STAGE OF PROCEEDINGS AGAINST HIM.

The question of whether a given identification procedure was so impermissibly suggestive as to require the suppression of evidence resulting therefrom requires a three step analysis: (1) Was the challenged confrontation suggestive? (2) If so, was it necessary? and (3) If it was unnecessarily suggestive, did it taint the testimony sought to be suppressed?

(Clifton) Gregory v. United States, _____ U.S. App. D. C. _____, _____ F.2d

_____ (No. 21,089, 3/18/69). In Gregory this court found suggestivity by the mere fact that the challenged witness viewed the suspect alone (as was the case with Mr. Hines). That the confrontation in the instant case was both unwarranted and unnecessary has already been documented. That the confrontation in this case at the scene of the robbery was suggestive so as to irretrievably taint subsequent out-of-court and in-court testimony is a question of facts and circumstances and it has already been found to be irretrievably suggestive by the District Court (Memorandum and Order, November 26, 1968, footnotes 13 and 22 and accompanying text).^{6/} Since the answer to the suggestivity question depends upon the facts and circumstances of the confrontation, Stovall, supra, the Court's attention is respectfully

^{6/} These findings were later reversed, without discussion, by the District Court (Memorandum and Order, April 28, 1969). It is submitted that the original findings still stand. The Russell decision, supra, relied upon by the District Court in its April, 1969 Memorandum and Order, did not change the facts and circumstances herein.

directed to the Statement Of The Case at pages 8-10 and 15-17, above, and to the Summary Of Argument at pages 22-24, above. Also, since another aspect of these circumstances is the prejudice to the accused caused by the inability of the defense to reconstruct what happened during such a confrontation, the Court's attention is respectfully directed to the portion of the Statement Of The Case, dealing with the destruction of police notes and conflicts between official police reports and witnesses' trial testimony, at pages 17-18 and 25, above. See also, Judge Winter's discussion in United States v. Collins, _____ F.2d _____ (4th Cir. 9/16/69, 6 Crim. Law Rptr. 2050) concerning the extreme difficulty of the defense in attempting to reconstruct identification procedures if counsel was not present; and Mason v. United States, _____ U.S. App. D.C. _____, _____ F.2d _____ (No. 21,818, 6/30/69, at page 8 of the slip opinion) which enumerates the dangers of misidentification in this kind of case:

These dangers may result from such diverse influences as the witness's desire to cooperate with the police, from his knowledge that he is expected to identify some one he sees (or indeed, as in the instant case, that he has already identified some one he will see), from uncertain recollections of a stranger's face distorted by a mental focus on particular features, from a generalized feeling of anger or vengeance, from suggestions subtly planted by the conduct or demeanor of a nearby policeman or other witness, from a calling of the defendant's name or an overheard description of his offense, and of course from a fortuitous line-up grouping which makes the defendant conspicuous or unique.

4. THE POLICE-ARRANGED LINEUP WAS IMPERMISSIBLY SUGGESTIVE AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW

Since the line up was conducted within four hours of the identification

confrontation at the scene of the robbery, and was viewed by three of the same witnesses, the line up is a nullity as to appellant Hines. The trial testimony regarding Mr. Gateau's line up identification of Mr. Hines, and Mr. Walshe's testimony to the same effect was at best cumulative and had to be in major part, the product of the confrontation at the scene of the crime four hours earlier. Moreover, since Mr. Gateau turned out to be a worthless witness at trial by repeating his mistaken preliminary hearing identification of Mr. Ware as being the suspect brought to the scene, and since at trial he couldn't identify Mr. Hines at all, the only real question about the line up as to Mr. Hines is whether Mr. Walshe picked him out as he claims. The substantial likelihood that Mr. Walshe identified only Mr. Ware at the line up (see pages 10-12, above), and that Mrs. Ricketson identified only Mr. Ware in the line up, actually support the theory of the case on behalf of Mr. Hines, and become incredible considering the totally unfair composition of the line up (as shown by the facts set forth in the Statement Of The Case, above).

Detective Reilly engaged in understatement when he admitted during the suppression hearing that "It may have been an imposition on my part" to have placed Mr. Hines in the line up (H. Tr. 108). The imposition being uncontested, the line up becomes an addition to the litany of other impositions not quite so obvious, as the police continued to build case against Mr. Hines.

5. THE VIEWINGS OF PHOTOGRAPHS BY IDENTIFICATION WITNESSES WERE IMPERMISSIBLY SUGGESTIVE AND VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO THE ASSISTANCE OF COUNSEL DURING CRITICAL STAGES OF PROCEEDINGS AGAINST HIM.

Although in Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court did not preclude in-court identifications by witnesses who had initially identified Simmons from pictures, "consisting mostly of group photographs," the Court did hold:

"...that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside***if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

See also United States v. Shanks, ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 22,361; 7/24/69) where this Court, while affirming the conviction, noted that 15 photographs were shown, not just an isolated single photograph such as was done on several occasions in the instant case, and the Court also relied upon the absence of any suggestion "that appellant's photograph was highlighted in any way, or that its selection was in any way prompted." (slip opinion, p. 4). In this case the photographs were shown to all of the witnesses, and they were relied upon by them because "the names and faces" couldn't be remembered otherwise (see pages 12-13, above). These were colored Polaroid snapshots of the only suspects, and the lineup photograph which was, of course, as suggestive as the lineup itself.

This Court in Shanks, supra, also underscored the additional factor accompanying the photograph viewings herein -- the absence of

counsel:

"But a danger of erroneous conviction lurks also in the possible inability of the accused to reconstruct the pictorial display" [citing United States v. Wade, 388 U. S. 218, at 229-32 (1967)].

The absence of counsel is particularly crucial in this case because of the ample evidence that Mrs. Boggs did not identify Mr. Hines at the scene of the crime as she claims (where no counsel was present to note whether she did or not), but rather, from photographs a month later prior to her grand jury testimony (see pages 9-10, above). In this connection it should be remembered that she was not permitted to make an in-court identification of appellant Ware, there being no dispute that her first claimed identification of Mr. Ware was tied directly to her viewing of the photographs when she was given free access to the police-Government file on this case while waiting to testify before the grand jury.

6. THE TESTIMONY OF GOVERNMENT WITNESSES SHOULD HAVE BEEN STRICKEN BECAUSE OF THE PREJUDICIAL AND INEXCUSABLE DESTRUCTION OF JENCKS STATEMENTS BY THE POLICE.

The sanctions provided by the Jencks Act [18 U. S. C. §3500(d)]^{7/} were called for in this case. The trial court should have granted the defense motion to strike the direct testimony of the Government's identification witnesses (and the motion for judgment of acquittal based

^{7/} The appropriate parts of the Jencks Act are reproduced in the Addendum to this Brief.

thereon) due to the unreasonable and prejudicial destruction by police officers of their notes. At least some of the destroyed notes clearly qualified as "Jencks materials" being substantially verbatim descriptions and statements given by the Government's identification witnesses.

The cases decided under the Jencks Act by this Court impose only two standards which must be satisfied by the defense in order to deserve the sanctions provided by the statute: (1) That the substantially verbatim statements not produced were not otherwise made available to the defense such as through typewritten police reports prepared from the notes and including all of the essential aspects of the notes; and (2) That the ability of the accused to defend has been jeopardized. There is no exception in this Circuit for the situation where police notes have been destroyed in good faith. Lee v. United States, _____ U. S. App. D. C. _____, 368 F. 2d 834 (1966). But even this additional requirement is satisfied in this case because the Government made no attempt to show that the notes were destroyed in good faith. Indeed, it was at the Government's urging that the trial court would not allow a hearing out of the jury's presence to determine the circumstances and justification, if any, for the destruction of the notes, and to determine the extent to which the notes were not incorporated, or incompletely incorporated into the typewritten police summaries which were made available to the defense (see pages 17-18, above, and especially T. Tr. 287-96). See also Campbell v. United States, 365 U. S. 95 (the Government has the burden of showing reasonableness and good faith); United States v. Lonardo, 350 F. 2d 523 (6th Cir. 1965); Ogden v. United States, 303 F. 2d

724 (9th Cir. 1962), 323 F.2d 818 (9th Cir. 1963); and United States v. Covello, 410 F.2d 536 (2d Cir. 1969).

In Covello, supra, the Court of Appeals for the Second Circuit held that

"Absent an indication that the notes were destroyed for an improper purpose or that the handwritten data was not preserved in the formal reports the reports satisfy the requirements of section 3500" 410 F.2d at 545.

That the police handwritten notes in the instant case were not preserved in the formal reports has been demonstrated (see above, pages 17-18, 8/ and the many contradictions between trial testimony and the police reports obtained by the defense which the Government claims incorporated all of the Jencks statements which came into existence, pages 28-30, above). Moreover, the typewritten police reports which were made available were nearly worthless as the bases for impeachment because of the Government's repeated objection that the reports contained no identification as to which witness contributed each item of contradictory information found throughout the typed reports! The Government should not be permitted this kind of double-barrelled impediment to rightful cross-examination, when the fault is entirely its own. 9/

8/ Note especially that the P. D. form 163 prepared and signed by Detective Reilly provides a space in which the "statement" of each witness is to be reprinted. In this case every space is blank. (Gov't. H. Exh. 13).

9/ In this connection it should be noted that not all police notes were destroyed. Private Wilson's handwritten notes (Gov't. H. Exh. 14) were produced at the suppression hearing. It should also be noted that these notes do not contain any statements or descriptions given by the witnesses at the scene of the crime.

The trial court compounded the defense dilemma by denying the requested instruction which was clearly called for by the facts, and by cases decided under the Jencks Act. The Lee and Lonardo cases, cited above, were also cited in support of the requested instruction. A copy of the requested instruction, as proffered at trial, is set forth in the Addendum to this Brief.

7. APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL.

This case poses a delay of seventeen and one-half months between arrest and trial. The claim that appellant Hines was denied his right to a speedy trial (formally moved after twelve months had elapsed) therefore has at least prima facie merit and the Government has a heavy burden of proving no prejudice to the defense. Smith v. United States, ____ U. S. App. D. C. ____, ____ F. 2d ____ (Nos. 21,157 and 21,158; 5/7/69); Hinton v. United States, ____ U. S. App. D. C. ____, ____ F. 2d ____ (No. 22,068, 10/14/69), and cases cited and discussed in Hinton.

When the formal defense motion to dismiss the indictment for lack of a speedy trial was finally heard and denied on the first day of trial (T. Tr. 13-28, and particularly T. Tr. 19-20), the Government relied solely on the official dockets in the District Court, claiming the main reason for delay was the hearing required by the defense motions for suppression of identification testimony. While there is some merit in this contention in that two months elapsed while the District Court held the matter under advisement, it should be noted that the motions were ready for hearing as early as April 15, 1968; however, it was not until

September 20, 1968 that the hearing was begun. This delay of five months was entirely beyond the defense to remedy. The defense was ready for hearing at all times, and in fact, the Government sought and was granted a continuance of the hearing on April 26, 1968. Thereafter a hearing was ordered held in abeyance until it could be heard at the time of trial.

The second substantial delay was a direct result of the Government's appeal (December 24, 1968 until remanded on April 16, 1969), and it is submitted that this delay does not fit the description of a pretrial procedure "for the benefit" of the defense.

Nor is prejudice due to the delay difficult to demonstrate. That police notes were destroyed prior to trial has been amply shown to have prejudiced the defense; and the resort to lack of memory by Government witness during cross-examination is spread ubiquitously on the record.

The indictment should have been dismissed as requested.

8. APPELLANT WAS DENIED A FAIR TRIAL BY BEING TRIED WITH THE TWO CO-DEFENDANTS, BY EVIDENTIARY RULINGS DURING TRIAL, AND BY THE COURT'S INSTRUCTIONS TO THE JURY.

a. The Defense Motion for Severance Should Have Been Granted.

The trial court's denial of the motion for a separate trial on behalf of appellant Hines should have been granted. The prejudice which was anticipated before the trial even began (see T. Tr. 30-34) actually occurred -- and with full force. The fears expressed over the "guilt by association" aspects of Mr. Hines being tried with his brother and

with a personal associate who was arrested in the Hines home were realized, especially when these associations were underscored by Government counsel in his closing argument -- and immediately after commenting on the fingerprint of Mr. Ware found at the scene and which, alone, was enough to convict appellant Ware. Moreover, the jury's acquittal of Mr. Hines' brother was a foregone conclusion (the trial court should have granted the brother's motion for judgment of acquittal), and his status as a defendant at trial (after being added as a defendant by a second indictment) had its desired effect -- associational guilt. See Coleman v. United States, ____ U. S. App. D. C. ____, ____ F. 2d ____ (No. 21,804; 11/28/69) for a general review of authority (slip opinion, pages 12-17).

Moreover, the clincher came as expected. The exercise of his Fifth Amendment right not to testify was turned against him by the comment of counsel for Mr. Ware in closing argument that he (Mr. Ware) testified in his own behalf "as you and I, if we were innocent, we would take the stand to try to exonerate ourselves * * *." (T. Tr. 878) This comment was made in spite of the trial court's ruling (T. Tr. 33-34) that Mr. Hines' failure to testify could not be commented upon. See De Luna v. United States (cited and discussed, supra, pages 18-19). It is also submitted that the combination of the fingerprint with the other associational factors linking appellants Hines and Ware had the same cumulative effect as presented in cases where a confession of one defendant names another. Severance in such cases would dictate severance here.

b. Trial Rulings.

Throughout the trial, the presiding judge expressed his discontent with defense cross-examination of Government witnesses, using the previous testimony and exhibits obtained by the defense as a result of the suppression hearing. (See, for example, T. Tr. 178-79, 188, 207, 391-92, 457, and elsewhere). Moreover, on the crucial question of what descriptions were given by the victim-witness before Mr. Hines was viewed by them at the scene, the trial court would not permit defense cross-examination seeking to establish the author of the first description broadcast on the police radio (Gov't. H. Exh. 10, page 2) which clearly did not match Mr. Ware. (See, for example, T. Tr. 370-74 and 454-55). Later, however, after cross-examination of these witnesses was concluded, Government counsel was permitted to ask police witnesses questions designed to elicit testimony regarding the same description (T. Tr. 567-70).

c. Jury Instructions.

In addition to the trial court's denial of the requested instruction dealing with the destruction of "Jencks statements" the trial court, while granting a specially drafted instruction on mistaken identification, added a bombshell comment, instructing the jury as a matter of constitutional law, that neither the identification confrontations at the scene nor the line up were suggestive or unfair. This comment was sharply objected to by defense counsel when the trial court first indicated it would be added to the main body of the instruction on identification testimony, and it was also pointed out by defense counsel that there had never been a ruling

on the fairness of the line up as to Mr. Hines (T. Tr. 805-19, especially 816-18 and 823-24).

Appellant Hines did not receive a fair trial.

CONCLUSION

This Court is requested to rule that the Government's identification evidence against Mr. Hines is inadmissible, to reverse his conviction, and to direct that the charges against him be dismissed.

In the alternative, if any of the Government's evidence against Mr. Hines is found to be admissible and not subject to being stricken, this Court is requested to reverse the conviction of Mr. Hines and to direct that the charges against him be dismissed on the basis that he received neither a speedy nor a fair trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of December, 1969, hand delivered two copies of the foregoing to the Offices of the United States Attorney for the District of Columbia.

Michael Valder

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Relevant portions of the Jencks Act (18 U. S. C. §3500) read as follows:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

(Instruction Requested by Defendant William Hines)

AVAILABILITY OF STATEMENTS BY GOVERNMENT WITNESSES

If you should find that any witness for the Government made a statement which was written down while the statement was being given and that such a writing was a substantially verbatim transcription of what the witness said, that the contents of that writing related directly to the testimony by that witness as given in this Court during this trial, that the Government did not give this writing to the Defense before the witness was excused, that the Government has not shown to your satisfaction that its failure to produce such a writing is reasonable, and that the information in such a writing was not provided by any other document which has been provided by the Government, then, if you deem it appropriate, you may draw an inference that such a writing contained information unfavorable to the Government.

United States v. Lonardo, 350 F.2d 523 (6th Cir. 1965)

Lee v. United States, 368 F.2d 834 (D. C. Cir. 1966)

No. 23,281

No. 23,391

(Consolidated)

In The
UNITED STATES COURT OF APPEALS
For The
DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee

Vs.

WILLIAM A. HINES and
THEODORE M. WARE,

Appellants

BRIEF OF THE APPELLANT THEODORE M. WARE

U.S. COURT OF APPEALS
DISTRICT OF COLUMBIA

FILED JAN 15 1970

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No. 23,281

No. 23,391

(Consolidated)

In The
UNITED STATES COURT OF APPEALS
For The
DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee

Vs.

WILLIAM A. HINES and THEODORE M. WARE, Appellants

Appeals from the United States District Court for the
District of Columbia

BRIEF OF THE APPELLANT THEODORE M. WARE

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether or not probable cause existed for the arrest of Theodore Ware.
2. Whether or not exigent circumstances existed, assuming that probable cause did exist, to justify the entry by police officers into a private home without a warrant and the arrest of Theodore Ware.

3. Whether or not evidence of Theodore Ware's fingerprints should have been admitted into evidence because of the foregoing entry and arrest.

4. Whether or not the line-up conducted by police wherein Theodore Ware was first identified by the witnesses was conducted in such a manner as to deprive him of due process of law.

5. Whether or not the showing of individual pictures of Theodore Ware by police to witnesses was done in such a manner as to deprive him of due process of law.

6. Whether or not the combination of the line-up and the showing of pictures was so unnecessarily suggestive as to be conducive to irreparable mistaken identification.

7. Whether or not the destruction of certain witnesses original statements given to police requires that their testimony be stricken from the record of the case under the provisions of the Jencks Act.

8. Whether or not the incorporation into a police form of only a portion of a witnesses original statement given to police, and the subsequent destruction of the full statement, requires that the testimony of such witness be stricken from the record of the case under the provisions of the Jencks Act.

9. Whether or not Theodore Ware was affirmatively and prejudicially mislead by the Government's denial until

trial that it possessed certain evidence.

10. Whether or not Theodore Ware was prejudiced in the defense of his case by the Government's seventeen month delay between the time of his arrest and his trial, coupled with its misleading actions.

11. Whether or not the giving of a part of the Allen charge prior to the jury commencing its deliberations was coercive.

REFERENCES TO RULINGS

Insofar as the defendant Theodore Ware's contentions concerning his arrest, the entry to arrest, the line-up, and the showing of pictures, such contentions were ruled upon by the District Court in its Memorandum and Order dated November 26, 1968, unpublished. Such order is a part of the Supplemental Record filed herein.

STATEMENT OF THE CASE

In the afternoon of December 18, 1967 at about 2:20 p.m. (T 263, 335)^{/1}, three armed Negro men robbed Walshe Realty Company at 1115 Eye Street, N.W. in the District of Columbia (T 335). Present in the company's office at the time were Mr. Bart J. Walshe its President (T 155), three of its employees, Mrs. Doris M. Boggs (T 261-2), Mrs. Katherine Heelen (T 269), and Mrs. Betty A. Ricketson (T 334), and a contractor who from time to time performed work for the company, Mr. William H. Gateau (T 195). Money was obtained from a cash drawer and from a safe, and placed in paper bags by the robbers (T 163, 267, 340). During the course of the robbery, Mrs. Boggs managed to trip a silent alarm (T 268). Shortly thereafter, one of the robbers, unseen by any of the witnesses until then, saw the police coming, called out to the other two (T 270, 341), and all three fled by going through a window at the back of the office next to an alley (T 164, 278, leaving behind the money (T 164, 492), an operable pistol (T 282, 355, 415, 502), and an umbrella (T 332, 390).

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The following abbreviations are used: T for Transcript; ST for Supplemental Transcript; R for Record; B for this Brief. The page number follows the abbreviation.

The defendants William A. Hines and Theodore Ware were arrested on the same day of the robbery, the defendant Edward Hines nine months later, and all were tried on a superseding indictment 17 months and 17 days after the first arrests, in June 1969.

Theodore Ware and William A. Hines were convicted on two counts of the offense of robbery in violation of Title 22, District of Columbia Code, Section 3204. Edward Hines was acquitted by the jury's verdict (T 924).

Theodore Ware was sentenced to serve 2 - 6 years on each count, concurrently (R 39, Judgment). He appeals such judgment of conviction in forma pauperis to this Court.

The Arrest of the Defendant Theodore M. Ware.

The first police officer to arrive at the scene of the robbery was Officer Thomas J. McFarland who was in time to see the three men flee down the alley to the rear of the building. He saw one man wearing a blue suit continue down the alley alone^{/2} (T 466-8), and saw the other two enter a yard and exit onto Eye Street close to 11th (T 470).

Officer McFarland was joined in the chase by Officer Edwin E. Frye who also had responded to the robbery call (ST 253; T 470, 478, 486). Officer Frye could only say

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Officer McFarland made a belated, first time identification of this man at trial as being Edward Hines. See B

at this point that he was chasing persons described as "Negro male", but after giving up the chase he went inside the Walshe Company office and obtained descriptions from one or more of the witnesses which he then broadcast as a "lookout" at about 2:36 p.m. (T 567-8, 573). The text of Frye's broadcast is as follows:

That's LOF #1 negro male, 23, 5'9", 145 pounds, white shirt, tie, dark suit, dark coat, dark pants, #2 same general, one subject was apprehended, 2 subjects are still out #1 and #2 armed with a short black revolver, obtained an unknown amount of cash. No injuries. (Def. William Hines Exhibit No. 2).

Admittedly by the officers, the descriptions that went over the air were composite descriptions of what people were telling Frye (T 568), with speed ". . . overriding the purpose of getting the most accurate description[s] possible" (T 569). After broadcasting the descriptions Officer Frye began to cruise the area (T 569).

The man that had been apprehended, as reported by Officer Frye in his broadcast, was the defendant William Hines, and his arrest came about as follows: Officer Marshal W. Wilson was assigned to scout car 27 on the day in question, and upon hearing a radio flash concerning the robbery he proceeded toward the nearby scene. Upon reaching 11th and K Streets he saw two men running diagonally across K Street, then north on 11th Street (T 433-4)¹³. He saw

¹³

Other people were running on the street in addition to the two men (T 452). This can be explained by

one of the men enter an alley alongside about 1016 - 11th Street, and disappear from view (T 437). Wilson later testified that he knew that the man who ran into the alley was not Theodore Ware (T 458-9).

As to the other man, Wilson turned the car around in the middle of the street, and as he put it,

The second man whom I observed running was about to cross the street and I blocked his path (T 437).

Continuing,

At this time he walked around to the right rear door of the scout car, opened it, got inside the car, and sat down and closed the door (T 439).

At the time, Officer Wilson had heard no description of anyone whatsoever (ST 52), knowing only that a robbery had been committed. Thus, not being sure of the situation, the man although handcuffed by him and contained in the car, was not in Wilson's view under arrest for anything (ST 54).

Officer Wilson took the man to the scene of the robbery (T 439-40), and when he led him handcuffed into the Walshe Company office about 15 minutes after the robbery (T 165-6, 275, 307), Mr. Walshe (T 176), Mr. Gateau (T 491), Mrs. Ricketson (T 350), and Mrs. Boggs (T 275) all said the man was one of the robbers.

Detective Patrick T. Lanigan arrived at the scene of the robbery, and seeing the man in Officer Wilson's custody

the fact that an erroneous "policeman in trouble" call had gone out on the air, and policemen and police vehicles were swarming in the area (ST 129).

recognized him by name as William Hines (T 554). Detective Lanigan testified that he knew William Hines lived at 906 K Street, that he had heard two subject were running east toward K Street, one wearing a black raincoat and the other a blue suit, and that William Hines had a brother who "fit the general description of the subjects [sic] who had escaped" (T 554-6). Thus, he left the scene for the K Street address (T 556), telling Lt. Samuel Wallace of his reason for going (ST 177).

Lt. Wallace, who testified only at the pre-trial hearing on the motions to suppress, reported the conversation with Detective Lanigan thusly:

Detective Lanigan was familiar with the Hines brothers. One had been arrested and brought back to the scene and he told me he believed the second man, one of the two men that were described, and not apprehended, answered the description of the brother and he wanted to go and check that out and I told him not to go by himself and I and another officer would go with him (ST 155).

Meanwhile, Officer Frye had driven north on 11th Street, and then east on K while cruising the general area, and eventually came to the 900 block of K Street (ST 255).

According to Officer Frye, he was looking for "a man in a black raincoat" (T 571). On reaching the 900 block Officer Frye, according to his testimony at the pre-trial proceedings, saw "a young man, Negro male but what he was wearing I don't remember exactly if it was a dark rain-

coat" (ST 255). Upon trial, however, he was able to recall definitely that the man was wearing a black rain-coat (T 571). Officer Frye said that he watched the man stand in front of the house for three or four minutes (ST 258) and then go inside (ST 257).

Apparently the thing that intrigued Officer Frye was that the man looked back at Frye from time to time (ST 261; T 571), inasmuch as the man had not been running (ST 256) and was simply having some conversation with a lady near the door (T 577).

Officer Frye did not attempt to apprehend the man or question him, saying that he had parked his car, and ". . . was going to call for assistance and about that time some officers arrived on the scene" (ST 257).⁴ Officer Frye stopped the officers prior to their entry to 906 K Street, and told them the following:

Q What did you tell them?

A I told them I had seen a subject going in that door that fitted the description we were looking for.

Q You say, "fitted the description." You are talking about the description you obtained at 1115 I Street?

A Yes, sir.

Q What was that description?

A I don't recall other than a negro male.

⁴

The officers were Lt. Wallace, Detective Lanigan, Detective Sergeant Gold, and at least two uniformed officers "along for assistance". (Preliminary Hearing, p. 23).

Q Just for a negro male?

A No, it was more than that at the time but I don't recall what the description was.

Q So all you said to these officers was that you had seen a young man. You didn't specify the description but you said of the description you heard you saw him enter the house?

A That's right.

Q Did you notice whether that man had on light or dark pants?

A I don't recall the clothing.

Q You don't have any recollection of what he looked like?

A No, sir.

Q You only looked at him for about a half minute?

A No, sir, I guess it was three or four minutes.

Q And you were fifty to seventy-five feet from him?

A I was right in front of this address whenever I was looking at him" (ST 257-8).

Detective Lanigan, Lt. Wallace, and the others knocked on the door of 906 K Street, and it was answered by Mrs. Irene Hines, the mother of William and Edward Hines (ST 157).

According to Lt. Wallace's testimony for the Government at the hearing on the motions to suppress, he identified himself to Mrs. Hines, showing her his identification, told her that a man had come in her house, and that they were looking for a man in a hold-up, at which time Mrs. Hines invited all of the officers into her home (ST 157).

As put by Detective Lanigan at the pre-trial hearing:
"Lt. Wallace identified himself and [Mrs. Hines] invited us in. We asked if anyone had come in the house" (ST 178).

In further explaining the "invitation" on cross-examination, Detective Lanigan elaborated a bit:

Q You testified on direct examination she invited you in. What did she say to invite you in?

A I think that she didn't want the neighbors to know what was going on (ST 187).

According to Mrs. Hines, she answered a knock on the door, and the next thing she knew the officers were inside of her house asking about her son Edward. About that time Theodore Ware, coming down from the upstairs, complained of the officers' actions. Ware was arrested, and Mrs. Hines ended up outside of her house crying (ST 142-3; T 757).

Upon trial the only testimony on the subject by Detective Lanigan was that, "Mrs. Hines let us in." (T 557).

After entry into the house, Detective Lanigan said he saw Ware coming down the stairs and immediately arrested him (T 557). As put by Detective Lanigan on direct examination,

I observed Mr. Ware, he was inside at the top of the steps. He placed -- well, I heard a commotion up at the top of the stairs (T 557),

and then as Lanigan clarified it on cross-examination,

Q When you say commotion, what do you mean by commotion?

A Well, a person was coming down the stairs, it's an older type house, I could hear him walking down the stairs.

Q You didn't hear any loud noises, or anything, you just heard someone coming down the stairs.

A That's correct (T 561-2).

The officers did not have a warrant (ST 187).

Mrs. Hines testified that Theodore Ware was a friend of her son William, and had been a visitor from time time in her home (T 763-4). She said that on the morning in question, around 11:00 o'clock, she saw three boys whom she identified by name as Bill Howard, Melvin McDuffy and Theodore Ware, with her son William in William's basement room at her home (T 763-4).

She said that she had occasion to go to her bank, and needed someone to drive her (T 765). She, her son William, and one of the boys other than Theodore Ware drove her to the bank (T 769), leaving Theodore Ware at the house (T 764). After returning Mrs. Hines to the house, William and the other boy drove off in her car (T 770-1). Mrs. Hines ate lunch at a nearby drug store, and thereafter returned to her home (T 765).

When Mrs. Hines came back to her house at 906 K Street from eating lunch at a nearby drug store, she saw Theodore Ware walk into the yard, and start toward the basement entrance (T 765-6). He told her that he was looking for her son William, and Mrs. Hines said nobody was there (T 752-3). Further, she told him that the door to William's basement room was locked and that she did not have a key (ST 150).

Ware stayed waiting in the yard (T 766), and about that time, Mrs. Hines noticed her car parked on the street. She testified that she went to get an umbrella from the car as it was starting to rain, then walked back to her house, then went inside, and that Ware remained outside in the yard for about five minutes (T 767).

Finally, Theodore Ware came inside Mrs. Hines home in order to use the telephone located in the front hall (T 767-8). Shortly thereafter the police entered (T 755, 766-7).

Theodore Ware testified in his own behalf (T 675 et seq.). He said that he had been at the Hines' home during the morning of the day in question, that William Hines had left the house, and then after waiting for some time at the house without knowing when Hines would return, Ware left (T 687). Some time later, while on his way to the Selective Service Office to see about his imminent induction, Ware discovered that his wallet containing his selective service papers was missing from his pocket (T 691). He went back to the house, saw Mrs. Hines who told him that William was not home, then he stood in the yard talking to Mrs. Hines about her car (T 693-5). He testified that Mrs. Hines came out, went to her car, then returned to her house, and it was about this time that Ware noticed a police cruiser come by (T 696). Ware went into the house to use the telephone

(T 697), and then went upstairs to use the bathroom (T 699). It was, Ware said, while returning down the stairs that the officers entered the house (T 699), in all, about five minutes after he had come inside (T 707).

Ware was not armed (T 758).

On the next day, December 19, Officer Thomas P. Reilly who was in charge of the case (ST 94) obtained a search warrant (ST 143), returned to Mrs. Hines home, and literally searched the house from top to bottom - from attic to basement (T 758-9).⁴⁵ Theodore Ware's missing wallet was found in the basement room at that time (T 540-1).

Identification of Theodore Ware.

Officer Reilly decided to hold a line-up the evening of the robbery (ST 97), for the exclusive purpose, according to Reilly, of having the witnesses name Theodore Ware as one of the robbers (ST 106-7). However, Reilly placed both of the accused persons, William Hines and Ware, in the line-up (ST 71). Both Hines and Ware were clean shaven (ST 99), weighed less than 150 pounds (ST 101), and were in their late teens (ST 99).

Officer Reilly added to the line-up:

Officer Wilson, who had been present at the Walshe office, and who led William Hines handcuffed to the scene

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Apparently charges were placed against Edward Hines, the acquitted defendant in this case, unrelated to the case at hand, and the search was questioned. Apparently the search was held to have been unlawful in such case, and the charges were dropped (T 496).

for identification by the same witnesses viewing the line-up, among others (T 439-40). Wilson weighed nearly 200 pounds (ST 72), and had a mustache (T 458); and,

Officer J. O. Williams, who also had a mustache (ST 71; T 459), and who had been with the witnesses at the scene of the crime (ST 68); and,

Officer Cheeks, who weighed at least 25 pounds more than either accused (ST 100), and was at least 12 years older than either one (ST 100); and,

Officer Lucas who weighed at least 180 pounds and was about 22 years older than the oldest accused (ST 100-1), and for good measure also had a mustache (T 459).

Betty Ricketson was the first person brought into the line-up room, and according to her testimony,

I was asked to go in and see if I could identify what would have been the first man that had entered our office (ST 197, 213; T 351-2).

Looking at each "carefully" (ST 227) she identified Ware in the lineup as "the first man" (ST 227; T 352, 495). She made no other identification (T 352).

The second person to view the line-up was Mr. Walshe (ST 103). Mr. Walshe testified that he could not and did not identify Theodore Ware as one of the robbers, but did identify William Hines as such (T 168, 494).

The third and last person to view the line-up was Mr. Gateau. He had no trouble in stating that he recognized "the two fellows" that were in the office" as being present

in the line-up (ST 289)^{/6}

In addition to viewing the line-up, the trial witnesses-to-be were shown pictures of the defendants on several occasions.

Prior to the hearing on the motion to suppress, Officer Reilly showed poloroid photos taken by the police of the defendants William Hines and Theodore Ware picturing Hines alone, Hines with Ware, and Ware alone, to the witnesses Mrs. Ricketson, Walshe and Gateau (ST 122-3).

Mr. Walshe was shown individual photos of each defendant prior to the hearing on the motion to suppress (ST 122-3, 247-8).

Mr. Gateau, after having mis-identified Ware at the Commissioner's Preliminary Hearing as the person brought to the robbery scene by Officer Wilson (ST 299), was drilled by Officer Reilly prior to his Grand Jury appearance utilizing both individual pictures of the defendants Hines and Ware (ST 299-300) and pictures of the defendants while in Officer Reilly's line up (ST 300-01). These individual pictures were again shown to Mr. Gateau before the suppression hearing (ST 122,305).

Betty Ricketson was shown individual pictures of Hines and Ware, at her request, prior to testifying before the Grand Jury (T 382), she was shown individual pictures prior

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Gateau later misidentified Ware on two different courtroom occasions (ST 299 and T 201, 207-8).

to the suppression hearing (ST 122), and she was shown the pictures of the defendants in Officer Reilly's line-up, according to Mrs. Ricketson, five or six different times "[g]ive or take" (T 387).

Doris M. Boggs, not present at the line-up and apparently somewhat doubtful of her ability to identify both defendants, was shown individual pictures prior to her going before the Grand Jury (T 315-6). It was only after looking over pictures of Ware taken from the police files and shown to her by Officer Reilly that she advised that she could serve as an identifying witness as to Ware before the Grand Jury (ST 275-6, 268; T 515-6). Even after having testified before the Grand Jury, she felt compelled to again look at the individual pictures, concentrating on the pictures of Ware (ST 276). As a result of the suppression hearing the District Court ruled that "Mrs. Boggs must be barred from testifying as to the identity of defendant Ware." (Memorandum and Order, p. 23).

On trial of the case Betty Ricketson testified that Theodore Ware was one of the robbers, identifying him in court as such (T 342), and William H. Gateau did likewise (T 200). However, Mr. Gateau erroneously identified Ware as the person returned to the scene by Officer Wilson both on direct (T 201) and at length on cross examination (T 207-8).

Neither Mrs. Boggs nor Mr. Walshe identified Ware as having been one of the robbers. Mrs. Heelen, both inferentially because she was not called by the Government as a witness, and factually according to Mrs. Boggs (ST 283; T 312), did not identify any of the defendants as one of the robbers.

The Identification and Arrest of Edward Hines.

Almost a year after the robbery, on the second day of the September 1968 hearings on the defendants' Ware and William Hines motions to suppress, Mrs. Boggs while on the witness stand pointed out Edward Hines, brother of the defendant William Hines and a courtroom spectator, as the third man (ST 279). This strange identification came about as follows according to the testimony of Mrs. Boggs: The hearing on the defendants' motions lasted two days, and Mrs. Boggs was present as a Government witness on both days. She said that she noticed Edward Hines sitting on the first row of the courtroom's benches. She then got into a staring contest with him ("I was looking at him, and he started looking back * * * [H]e looked at me, directly in the eye, and I looked at him"). When Court adjourned the first day Mrs. Boggs saw Edward walk up to the defense counsel table and join his brother. The staring contest resumed the next day (T 217-21, 280-1, 327). Then, while on the stand, the

following occurred:

Q . . . have you ever seen the third man again?

A Yes.

Q Where?

A Right there. (Pointing to a spectator in court)
(ST 279)

Even though Edward Hines had lived continuously with his mother at the K Street home from and prior to the date of the robbery on December 18, 1967 until the date of his arrest, almost one year later, the police at no time attempted to question him, or even to make inquiry about him in connection with the robbery after December 19 which was the day of the extensive search of Mrs. Hines home at which time pictures of Edward Hines were taken from the premises (T 798-9, 760). Although Officer Reilly had taken pictures of Edward Hines from Mrs. Hines' home on December 19, 1967, apparently no pictures of Edward were ever shown to any of the witnesses to the robbery, and for a fact none were ever shown to the identifying witness, Mrs. Boggs (T 328).

Nevertheless, after the courtroom identification as above set forth, the police charged Edward Hines with the robbery, arrested him and tried him. The fact of the matter was that Edward W. Hines had been in Philadelphia when the robbery was committed (T 791, 774-5), and he was acquitted of all charges by the jury's verdict (T 924).

Other than for Mrs. Boggs, the Government proceeded to trial with only one witness saying that Edward Hines was one of the robbers, then at the eleventh hour found a witness in the person of Officer McFarland who after coming to Court for the trial, for the first time, reported that he had known all along that he could identify one of the robbers, according to Officer Reilly (T 537) and as confirmed by Officer McFarland on cross examination (T 478, 480-1, 537). He identified Edward Hines as one of the robbers (T 478).

The Partial Fingerprint.

Officer Reilly was at the scene when Officer Clayton E. Keys of the Identification Section of the police department arrived, and Reilly personally instructed him as to what he wanted done with regard to making a check for the presence of latent fingerprints (T 538, 591).

Keys found about six latent prints ". . . that [he] thought were suitable for identification" which he lifted from the glass desk top in the rear of the Walshe office (T 592). Keys testified that, "follow[ing] regular procedure" he filed the latent print, referring to Government Exhibit 8, "in its proper location" (T 594).

Later in the same day, between 6:10 and 6:28 p.m., the same Officer Keys fingerprinted the defendant Theodore Ware during "processing" (T 594-5). Keys classified Ware's

prints, checked them against other prints, and filed the fingerprint card "in its proper location" (T 595).

In the course of the Preliminary Hearing, Officer Reilly testified under oath that, first latent fingerprints had been found at the scene, and second that the latent prints were not those of the defendant Theodore Ware. ¹²

No fingerprint evidence was introduced at the Preliminary Hearing.

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On cross examination of Officer Reilly by counsel for the defendant William Hines:

Q (by Mr. Valder) Officer Reilly, did you try to find any fingerprints at the scene of the crime?

A Yes, sir; we did.

Q Did you find any?

A Yes, sir. They were found by the Bureau of Identification.

Q Where at the scene were fingerprints found?

A They were found --

Mr. McKenna (Assistant United States Attorney):
Your Honor, I object . . .
(Preliminary Hearing, p. 13)

On further cross examination of Officer Reilly by counsel for the defendant Theodore Ware:

Q (by Mr. Williams) You said on direct ^[sic] examination that there were no fingerprints taken of -- no fingerprints recovered at the scene of the crime -- of Mr. Hines. I'll ask you the same question with regard to Mr. Ware. Have there been fingerprints taken at the scene of the crime that match Mr. Ware's fingerprints?

A To my knowledge -- no, sir.
(Preliminary Hearing, pp. 23-4)

Thereafter, and prior to the hearing on the defendants' motions to suppress, Officer Reilly met with the Assistant United States Attorney then handling the case on at least eight different occasions, describing the meetings as having for their purpose "... to produce what evidence we had . . ." (ST 126, 134-5).

No fingerprint evidence was introduced at the hearings on the motions to suppress commencing September 20, 1968.

On May 6, 1969 during pre-trial proceedings conducted by the District Court as reflected by its Memorandum of Pretrial Conference dated May 7, 1969, no fingerprint evidence was mentioned and none alluded to.

On trial, Officer Reilly answered that his investigation of the case could correctly be described as "very thorough", "exhaustive" and "complete" (T 533).

Finally, on the day trial commenced, the defendant Theodore Ware was advised through counsel that the police officers made another check of department files, found latent prints believed to be Ware's, and that the Government would introduce at trial evidence of his fingerprints having been found at the scene of the robbery (T 5). Mr. Edward J. Dion, a fingerprint analyst assigned to the Identification Bureau, testified that on the same morning the trial started, June 3, 1969, he made a comparison of Government Exhibit 8, which he had received from Officer Reilly, and Government Exhibit 9, and identified Government Exhibit 8 as a partial

print of the "left little finger" of the defendant Theodore Ware, giving his opinion to the jury (T 599, 601-6). Government Exhibit 9 was the fingerprint card made by Officer Keys during "processing" (T 594-5; Government Exhibit 9).

ARGUMENT

- I. THE DISTRICT COURT ERRED IN REFUSING TO GRANT THE DEFENDANT WARE'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS THE RESULT OF HIS UNLAWFUL ARREST BY THE POLICE, PARTICULARLY GOVERNMENT EXHIBIT 9 BEING THE FINGERPRINT CARD ERRONEOUSLY ADMITTED INTO EVIDENCE AS THE KNOWN FINGERPRINTS OF THE DEFENDANT.

On March 26, 1968 the defendant Theodore Ware filed a motion to suppress, among other things, any evidence obtained as a result of his arrest stating as grounds therefor the illegal entry into Mrs. Hines' home and his arrest without probable cause and without a warrant (Ware, Motion to Suppress).

A hearing was held on the motion, as well as on other pending motions, in September 1968, evidence was taken, and on November 26, 1968 the District Court held that the arrest was legal (Memorandum and Order, p. 20).

- A. THEODORE WARE'S ARREST WAS UNLAWFUL BECAUSE IT WAS MADE INSIDE A PRIVATE HOME, WITHOUT A WARRANT, AND WITHOUT PROBABLE CAUSE THEREFOR AT THE TIME THAT IT WAS MADE.

At the moment Theodore Ware was arrested in the home of Mrs. Hines, the arresting officers had no probable cause to make the arrest. If the officers did not have probable cause to enter Mrs. Hines' home, then further consideration under subparagraph B of this brief, i.e. whether or not "exigent circumstances" existed, is unnecessary.

The moment of the arrest is the key point in time, for as the Supreme Court stated in Beck v. Ohio, 379 U.S. 89 (1964),

Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it. (379 U.S., at 91)

It is also important to bear in mind that events occurring after the arrest, such as Ware's line-up identification by Mrs. Ricketson and Mr. Gateau cannot operate retroactively to supply the probable cause which was lacking in the first place. This was pointed out by the Supreme Court in United States v. Di Re, 332 U.S. 581 (1948) concerning a search conducted after an illegal arrest:

We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success. (332 U.S., at 595)

Recognizing that police officers sometimes make post facto justifications for arrests on suspicion, this Court said in Wrightson v. United States, 95 U.S. App. D.C. 390, 222 F.2d 556 (1955),

It is perfectly true that after the arrest Wrightson was identified by the victim of the robbery and confessions were presented and received. But the tendency of police officers to arrest people without warrants and without probable cause is a matter of vast public importance, and it has been of such importance since Colonial days. Courts cannot put a stamp of approval upon actions of the police when the officers, challenged by an accused, fail or

refuse to demonstrate compliance with the rules which circumscribe their authority. Certainly the police have been warned enough in these respects, by the Supreme Court of the United States [citing Di Re, supra, among others], by this Court and by many other courts. (222 F.2d, at 558)

The Beck case, supra, also contained a definition of probable cause applicable to the circumstances at hand, defining the words to mean, ". . . whether at that moment" referring to the precise moment of arrest,

the facts and circumstances within [the officers] knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. (379 U.S., at 91)

And, as this Court has emphasized, the officer must be "reasonable" and "cautious" in assessing such facts and circumstances. Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82, at 86 (1958), cert. den. 358 U.S. 885.

The following four cases are relevant to the case at hand. Each of them holds probable cause for arrest to have existed, and together they indicate that none of the arrests were made on suspicion, that the officers were after a person or persons known by them to be fleeing, and that either the descriptions were sufficient to distinguish the person from the others in the vicinity or the unusual time of day, e.g. 5:00 a.m., lessened the need for such a distinguishing description.

In Chappell v. United States, 119 U.S. App. D.C. 356, 342 F.2d 935 (1965) a taxi driver was robbed at 5:00 a.m.

and the driver gave a description of the robbers to the police. Two newsboys waiting for their papers directed the police to a house less than a block away to which the robbers had entered on the run, the descriptions matching. This Court held that the officers had probable cause to enter the house and arrest the defendant.

In Brown v. United States, 125 U.S. App. D.C. 43, 365 F.2d 976 (1966) police at 4:30 in the morning questioned the driver of a car stopped for a traffic light because the tag light on his car was out, then hearing a "lookout" over the police radio for a Negro male of heavy build in a maroon 1954 Ford who had just robbed a Howard Johnson restaurant about 20 blocks away, they looked at the defendant who was a heavy Negro male, driving what the officers took to be a 1954 maroon Ford automobile (it was actually a 1952 maroon Ford automobile), at 4:30 o'clock in the morning, searched his car and arrested him for the Howard Johnson robbery. This Court held that the officers had probable cause for arresting the occupant of the car.

In Trimble v. United States, 125 U.S. App. D.C. 173, 369 F.2d 950 (1966) the robbery victim was chasing after the robber, and upon passing an officer shouted for assistance. The officer gave chase, got a second officer to join the chase, and the second officer caught the defendant and arrested him. The Court held that the second

officer had probable cause to arrest the defendant because of the continuous chain of events.

In Mathies v. United States, 126 U.S. App. D.C. 98, 374 F.2d 312 (1967) the arresting officer knew that the defendant was one of a group who were fleeing from a wrecked car which had been identified as the getaway car, was directed by another officer to an alley to which the defendant and another had fled, and then was directed by a passerby to the house into which the two men had entered. The officer was given consent to enter the house, the owner not knowing that anyone had entered his house, and the officer found the two men hiding in the basement. This Court held that there was probable cause to believe that the defendant had entered the house, and that he was a fleeing participant in the original crime.

It is recognized that as is so often stated, there is no litmus paper test to determine when probable cause does exist. Further that the parameters of probable cause have been, and will remain ill-defined, requiring each case to be decided on its own facts. Nevertheless, it can be seen from examining the facts of the case at hand that the officers had no probable cause to enter Mrs. Hines' home and arrest Theodore Ware when they did so.

What took the arresting officers to Mrs. Hines home? It is abundantly clear that the only thing that started

them out to the house at 906 K Street was Detective Lanigan's recognition of William Hines which gave rise to his suspicion that William Hines' brother Edward Hines might be involved. The degree of urgency and definiteness of Detective Lanigan's thinking is neatly summed up in his statement as reported by Lt. Wallace that Lanigan simply "wanted to go and check that out." Lanigan was after Edward Hines, without knowing what Edward Hines was wearing at the time, or even knowing whether he otherwise matched the descriptions, or even knowing whether or not Edward Hines was in the vicinity. As it turned out Edward Hines was not even in town.

The courts have been for a long period unanimous in recognizing that probable cause means something more than suspicion. The Supreme Court makes the point in Henry v. United States, 361 U.S. 98 (1959):

The requirement of probable cause has roots that are deep in our history . . . referring to various Acts of the American Colonies

* * * * *

That philosophy later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principal has survived to this day. (361 U.S., at 100-01)

The District Court in its Memorandum and Order recognized and so found that it was mere suspicion that

took Detective. Lanigan and Lt. Wallace to the Hines home, but felt that probable cause was supplied for their entry into the house via Officer Frye (Memorandum and Order, pp. 17-18).

The factual situation was that Officer Frye was not really alarmed over having seen someone wearing a raincoat on a rainy day. He said he parked his car and was thinking about calling someone, but the fact was that he made no call to anyone whatsoever. Most important is the fact that Officer Frye who sat for at least four minutes in a car parked in front of Mrs. Hines' home (ST 257-8) observed no suspicious acts on the part of the man who later went in the house, other than looking over at the officer from time to time. The man was simply standing in the yard, talking to Mrs. Hines.

The District Court cited the Chappell case, supra, one of the cases discussed by the Appellant in this Brief, as authority for its ruling on the motion to suppress, that the police had probable cause to believe that the man who entered the Hines home was involved in the robbery (Memorandum and Order, p. 18). The great distinction is the fact that the Chappell case involved defendants seen to have been on the dead run, and traced to a particular house (eventually found hiding in the basement).

Here, Ware had not been seen running, he was not seen to make a hasty entry into the Hines home, and he was not

seen by the observing officer to do any act so as to cast suspicion on himself. The officer observed a man acting just as any normal person would act who had not done anything wrong and who had no reason to run and hide.

In fact, the case at hand is more analagous to the case of Gatlin v. United States, 117 U.S. App. D.C. 123, 326 F.2d 666 (1963) wherein this Court held an arrest to have been made without probable cause. The defendant had been arrested on a general description, the distinguishing point being that the lookout was for a Negro man wearing a trench coat. This Court said, that the arrest was in fact one for investigation and without probable cause. A further similarity between Gatlin and the case at hand is the fact that after Ware's arrest he was not booked and processed until slightly over three hours after his arrest, which is about the time of the line-up held by Sergeant Reilly of the Robbery Squad. The record indicates that Ware was fingerprinted during the period from 6:10 p.m. to 6:28 p.m. after his arrest (T 595).

In its Memorandum and Order the District Court says that,

The facts in the instant case are strikingly comparable to those which confronted the Supreme Court in Warden v. Hayden, 387 U.S. 294 (1967). Similar to what transpired in Warden the police here were in virtual hot pursuit, and they sought to enter the house only upon information that someone fitting the description of one of the perpetrators had been seen entering the premises. (Memorandum and Order, pp. 19-20)

From the above quoted portions of the District Court's Memorandum and Order it is clear that the Court found that consent to enter had not been given by Mrs. Hines.

The Court said that having probable cause, and being in "hot pursuit" no warrant was necessary (Memorandum and Order, p. 18). It is submitted, however, that no one was pursuing Ware, that "hot pursuit" did not in fact exist, and that no exigent circumstances thus existed in the case now before this Court. Theodore Ware, while observed by a police officer was not acting in any suspicious manner. To the contrary, he was standing in the front yard of 906 K Street, when first noticed by the officer, conversing with the lady of the house, Mrs. Hines. He had not been seen running, or acting as one having need to find a hiding place; he continued his conversation with the lady of the house for a full three or four minutes, knowing all the time that he was being observed by a policeman. In the three or four minutes from the time that the policeman had seen Ware the policeman did not give any alert. The observing policeman, by coincidence, was parked in front of the house to which other officers came as the result of mere suspicion. It is clear that there was nothing approaching "hot" pursuit, which was the only exigency likely to justify their entry and the one found to have existed by the District Court. Rather the statement to the incoming officers by Officer

Frye that a man wearing a raincoat (on a rainy day) had entered the house, supposedly changed a situation devoid of pursuit to a situation demanding of no delay and immediate entry. Such just was not the case.

Assuming for the moment that by some manner or means the officers had information to constitute probable cause, a warrant still was required for entry into Mrs. Hines' home. A warrant was not obtained. No consent to enter was given, and no exigent circumstances existed so as to make a warrant unnecessary.

C. THE FINGERPRINTS TAKEN OF THEODORE WARE FOLLOWING HIS ILLEGAL ARREST WERE THE PRODUCT OF SUCH ARREST, AND SUBJECT TO SUPPRESSION UNDER HIS MOTION.

In the District of Columbia case of Bynum v. United States, 104 U.S. App. D.C. 368, 262 F.2d 465 (1958) the record disclosed no probable cause for arresting the defendant on a felony charge, and this Court held, therefore, such defendant's fingerprints taken following his arrest were inadmissible in evidence since they were the product of an illegal arrest.

The fingerprints taken of Theodore Ware as the product of his illegal arrest were those taken between 6:10 and 6:28 p.m. following his arrest some three hours earlier, and were admitted in evidence as the known fingerprints of Ware for comparison purposes with the unknown partial print. Such known fingerprints were covered under the defendant



Ware's motion to suppress which was erroneously denied.

It should also be mentioned parenthetically that the police were not operating under any kind of procedure designed to secure fingerprints while holding a suspect under some sort of detention short of arrest, as such possibility is mentioned by the Supreme Court in Davis v. Mississippi, 394 U.S. 721 (1969) in which the Court adopts the conclusion of this Court in Bynum, supra, that fingerprints are subject to the proscriptions of the Fourth Amendment and subject to the exclusionary rule for violation thereof.

Ware's motion to suppress evidence obtained as a result of his arrest should have been granted, and Government Exhibit 9, being a product of Ware's illegal arrest — should have been excluded from evidence of the case.

II. THE DISTRICT COURT ERRED IN REFUSING TO GRANT THE DEFENDANT WARE'S MOTION TO SUPPRESS HIS IN-COURT IDENTIFICATION, AND IN ALLOWING THE WITNESSES RICKETSON AND GATEAU TO MAKE IN-COURT IDENTIFICATIONS OF WARE BECAUSE HIS PRE-TRIAL IDENTIFICATIONS WERE CONDUCTED BY THE POLICE IN SUCH A MANNER AS TO DEPRIVE HIM OF DUE PROCESS OF LAW, AND WERE SO UNNECESSARILY SUGGESTIVE AS TO BE CONDUCTIVE TO IRREPARABLE MISTAKEN IDENTIFICATION.

In this Court's review in Clemons v. United States, _____ U.S. App. D.C. _____, 408 F.2d 1230 (1968) of the trilogy of United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967) and Stovall v. Denno, 388 U.S. 293 (1967), it was pointed out that the Supreme Court in its Stovall opinion noted that, aside from contravening the Sixth Amendment, a pre-trial confrontation could be so conducted as to violate due process of law. The Supreme Court stated that the test for determining whether such a violation had been committed was whether or not the procedures employed at the pre-trial identification were "unnecessarily suggestive and conducive to irreparable mistaken identification", and then elaborated further on its standard by saying: "[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . ." Stovall v. Denno, supra, at 301-2.

The District Court refused to grant Ware's motion to suppress his identification in court by the witnesses Ricketson and Gateau (Supplemental Motion to Suppress

Defendant Ware's In-Court Identification, p. 8).

The facts show that the line-up was so unfairly arranged and conducted that the attention of the witness was focussed on one person, Ware, that it was, in effect, a one-to-one confrontation, and the subsequent exhibition of pictures of the defendant singly, with William Hines, and pictured in the unfair line-up, were again in reality one-to-one situations. It is contended that both the line-up identification, and the subsequent photo identifications of the defendant Ware by the witnesses, particularly the crucial witness Betty Ricketson, were per se violations of due process of law because of the manner in which they were conducted, and that the later photo identifications so reinforced the witnesses line-up identification as to be conducive to irreparable mistaken identification.

Theodore Ware was clean shaven, weighed less than 150 pounds, and was thought to be in his late teens. William Hines was added to the line-up. He had just a few hours ago been shown handcuffed to the witnesses who were going to view the line-up. Added to the line-up were four police officers: Three with mustaches, two having been with the witnesses at the scene of the crime, one bringing in the handcuffed Hines, all being older by at least 12 years and in one instance by 22 years, and all heavier by at least 25 pounds. Further, the witnesses had been told by Officer

Reilly that the suspects were in their late teens, and that he was interested in obtaining the identification of the "other" man.

A neon arrow pointing straight at the defendant Ware would not have done the job any better! It was in fact a one-to-one confrontation.

This case is somewhat similar to the case of Foster v. California, 394 U.S. 440 (1969) which involved unfair police line-ups. In Foster there were three men in the line-up, the defendant being tall, close to six feet, and the other two men were short, about five feet five or six inches. Then after showing the defendant alone to the identifying witness, another line-up was held with five men in the line-up, the defendant being the only person who was in the first line-up. The Court found that the first and second line-ups were both so suggestive as to make it inevitable that the defendant would be identified. The Court held that "this procedure so undermined the reliability of the eyewitness identification as to violate due process". 394 U.S., at 443.

There must even be added to the foregoing, however, the repeated showing of individual pictures of the defendant Ware to the witnesses. As recognized by the Supreme Court, the danger of an incorrect identification is increased if the police display to a witness only the picture of a single

such individual. Simmons v. United States, 390 U.S. 377 (1968). This too is simply a one-to-one identification.

The use of photographs in the present case should be compared to the manner of their use approved by this Court in United States v. Hamilton, _____ U.S. App. D.C. _____, _____ F.2d _____ (1969), Slip Op., p. 4. This case is a far cry from Hamilton. The use of photos on a one-to-one basis made certain that which was already virtually inevitable because of the unfairly arranged and conducted line-up.

Both Stovall and Wade, supra, indicate that in considering the totality of circumstances surrounding any pre-trial identification, the fact that such identification is conducted, in effect, as a one-to-one confrontation weighs heavily against in-court validity. Exclusively improper pre-trial identification, as here, is totality by the very definition of the word.

III. THE DISTRICT COURT ERRED IN REFUSING TO GRANT THE DEFENDANT WARE'S MOTIONS TO STRIKE FROM THE RECORD UNDER THE PROVISIONS OF THE JENCKS ACT THE TESTIMONY OF CERTAIN WITNESSES INCLUDING THE WITNESSES RICKETSON AND BOGGS BECAUSE THEIR ORIGINAL STATEMENTS HAD BEEN DESTROYED AFTER SELECTIVE INCORPORATION OF PARTS THEREOF INTO POLICE DEPARTMENT FORMS, AND BECAUSE THEIR ORIGINAL STATEMENTS WERE AMALGAMATED WITH OTHERS SO AS TO LOSE THE CAPABILITY OF THEREAFTER TELLING WHAT PORTION OF THE FORM REPRESENTED THE STATEMENT OF WHICH WITNESS.

Mrs. Ricketson gave a statement to Officer Reilly (ST 207; T 360). Mrs. Boggs also gave a statement to Officer Reilly (ST 285; T 285).

The record reflects that other officers were making notes of what the witnesses at the scene of the robbery were saying, although, as testified by Mrs. Ricketson, notes being taken of such conversations were "not in detail as much as Sergeant Riley's" (ST 208). However, Officer Thomas J. Casem testified that he took down statements from at least one of the witnesses at the scene (T 420). The other officers taking statements from witnesses at the scene remain unidentified in the record.

Many of the participating officers made individual statements (T 513). These individual statements by officers were in the main turned over to Officer Reilly (T 510).

With one exception, Officer Wilson, the original notes which reflected the statement of a particular identifiable witness, were incorporated into one or more police department forms (T 361), wherein certain portions of the original

statement were left out (T 424). The resulting form such as the Police Department Form 163 signed by Officer Reilly (T 504), was in fact an amorphous form, being an amalgamation of the statements of many witnesses, without any way to identify who said what (T 504). The original notes were then destroyed (T 361, 510).

Only Officer Wilson, being the only officer who had retained his handwritten original notes (T 443-4) which, incidentally, were turned over to defense counsel (ST 79), was able to identify a particular part of one of the forms as being his contribution thereto (T 450). Officer Casem thought that he had retained his original notes, but he reported that after searching he could not find them (T 422).

More specifically concerning the foregoing: Officer Casem had destroyed his notes, yet he recalled, however, that he had taken a statement from one of the witnesses at the scene, but could not identify who it was, in fact he could not even recall whether it was from a man or a woman (T 420-1). Some part of the statement of that person was made a part of the Offense Report, Form 251 which Officer Casem signed (T 420, 424). The original notes were either destroyed or lost for after searching for them Officer Casem could not find them (T 422).

With regard to the crucial witness Betty Ricketson, the only one to testify that she thought Ware was one of

the robbers other than Mr. Gateau who mis-identified Ware twice, demand was made by counsel for the defendant Theodore Ware for the handwritten notes made by Officer Reilly which constituted the statement that he had taken from her at the scene (T 361). It was admitted that the notes had been destroyed after incorporating them into a typewritten form. In ruling on Ware's demand for production of the statement of Mrs. Ricketson taken by Officer Reilly after the witness had testified on direct examination, the following occurred:

Mr. Williams: Your Honor, instead of going through the same argument that I went through before with Mrs. Boggs, I make the same point at this time that we move for the production of those handwritten notes supposedly taken by Officer Reilly, with the same argument. That's all I have to say.

The Court: All right. I think the record ought to show that Officer Reilly has previously been at the bench. He has testified that he took certain notes. That after taking certain notes, he incorporated them in a typewritten form. That after they were so incorporated, he destroyed the notes, and these notes are no longer available.

I will, therefore, overrule your objection and note your exception.

Mr. Williams: You will deny my motion?

The Court: That's right. I deny your motion.
(T 361)

The prior instance, referred to by counsel for Ware in his motion for production of the statements concerned a demand for statements made under the provisions of the

Jencks Act by counsel after Doris Boggs had testified on direct examination. Mrs. Boggs had testified that she gave a statement to Officer Reilly, and that "He was taking notes down, writing with a pencil on paper" (T 286). Thereafter,

Mr. Williams: We specifically move for the handwritten notes.

Mr. Green (Assistant United States Attorney):
Of Detective Reilly?

Mr. Williams: Of Detective Reilly.

Mr. Green: It is my information -- I can only tell you what he told me -- he doesn't have his handwritten notes.
(T 287)

Whereupon Officer Reilly came to the Bench (T 287).

Mr. Williams (to Sergeant Reilly): Did you take a handwritten statement from Mrs. Boggs at the scene of the crime about an hour or so afterwards?

Mr. Reilly: Other than notes, just general.

Mr. Williams: You did?

Mr. Reilly: Which we transcribed.

The Court: You threw them away after transcribing them?

Mr. Reilly: Yes, sir. We make them into a form.

Mr. Valder: Ask which police statement? What is the substance of those notes transcribed to?

Mr. Reilly: It would be compiled into everything as to what we used, the final writeup, which is what we make this from (indicating).
(T 288-9)

In explaining that the forms were in fact an amalgamation of statements brought in by other officers, and

statements by witnesses (T 289), Reilly said that he could not pick out from the forms anything in particular attributable to Mrs. Boggs (T 290-1). Counsel for Ware reiterated his demand for the original statement of Mrs. Boggs (T 291), and the Court found that they were not available (T 292). Counsel for Ware then moved to strike Mrs. Boggs testimony (T 292).^{/8}

The statute in question, 18 USC 3500, the so-called Jencks Act, defines a "statement" as either,

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. 18 USC 3500(e)

The cases of Papworth v. United States, 256 F.2d 125 (5th Cir., 1958), cert. den. 358 U.S. 854, and Clancy v. United States, 276 F.2d 617 (7th Cir., 1960) both deal with handwritten notes of a Government agent as opposed to the later transcription thereof, and hold that the original handwritten notes were "statements" within the meaning of the Jencks Act. Papworth dealt with notes of an agent's conversations with a witness written in long-

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Counsel for William Hines and for Edward Hines conditioned their motions to strike the testimony of Mrs. Boggs on the ability of Officer Reilly to point out in the forms what part thereof was attributable to which witness (T 292 and 293). Officer Reilly was, of course, unable to satisfy the condition.

hand in a notebook. Clancy dealt with longhand notes taken at the time of the interviews.

The cases are numerous that effectively hold whenever a Government agent's handwritten notes are transcribed substantially verbatim into a typewritten statement, and that agent testifies that an accurate, complete, transcription was made, then the original notes can be destroyed, and the typewritten notes will suffice to satisfy compliance with the statute when delivered after demand.

For example, in Alexander v. United States, 118 U.S. App. D.C. 406, 336 F.2d 910 (1964), cert. den. 379 U.S. 935, a pencil draft was handed to a stenographer who typed it out and destroyed the pencil draft. The statement remained the statement of a single officer, and instead of being in pencil it was typewritten. Much the same situation was involved in the case of United States v. Comulada, 340 F.2d 449 (2d Cir., 1965) where an Agent of the Federal Bureau of Narcotics had prepared his daily reports from 3x5 inch handwritten cards. The daily reports were written up from the cards, and the cards destroyed. The agent testified that everything on the cards were in the reports. Again, the report remained the report of one particular identifiable person.

The statute clearly provides that, as to non-compliance, the court shall strike from the record the testimony of the

witness and proceed with the trial, or declare a mistrial.
(18 USC 3500(d))

This Court has strictly enforced the requirements of the Jencks Act, going so far as to rule in the case of Lee v. United States, 125 U.S. App. D.C. 127, 368 F.2d 834 (1966) that under the facts of the case which involved a delay in bringing the defendant to trial, there could be no such thing as a "good faith" destruction of a statement.

The testimony of the witnesses Boggs and Ricketson among others should have been stricken from the record as required by the Jencks Act.





IV. THE DEFENDANT WARE WAS AFFIRMATIVELY MISLEAD BY THE GOVERNMENT BY THE DENIAL UNDER OATH BY THE OFFICER IN CHARGE OF THE CASE OF THE EXISTENCE OF ANY FINGERPRINT EVIDENCE INVOLVING HIM, SO THAT WHEN AT TRIAL SEVENTEEN MONTHS AFTER SUCH DENIAL AND SUCH DEFENDANT'S ARREST HIS ALLEGED PARTIAL FINGERPRINT WAS INTRODUCED IN EVIDENCE HE HAD NO EVIDENCE AVAILABLE TO COUNTER THE GOVERNMENT'S EVIDENCE.

It is contended by the defendant that the action by the Government in the present case constitutes a trial by ambush, and while that in itself does not violate due process of law, this Court would be acting properly to reverse the case for such action whether or not unintentional.

Additionally, however, this Court has held that "periods of delay from arrest to trial which exceed a year raise a claim to violation of the Sixth Amendment with 'prima facie merit'". Harling v. United States, 130 U.S. App. D.C. 327, 401 F.2d 392, at 395 (1968). It is apparent that here the defendant's defense of his case could not have but been impaired by the complete lack of preparation to meet fingerprint evidence, having been affirmatively misled by the Government's actions. It is contended that, much in the nature of the case of Lee v. United States, 125 U.S. App. D.C. 127, 368 F.2d 834 (1966) the Government's affirmative prejudicial conduct coupled with the delay of seventeen months in bringing the defendant Ware to trial constitutes a violation of the Sixth Amendment, and the defendant's conviction should be reversed because of it.

- V. THE GIVING OF A PORTION OF THE ALLEN OR DYNAMITE CHARGE TO THE JURY PRIOR TO ITS RETIREMENT TO BEGIN CONSIDERATION OF ITS VERDICT WAS ERRONEOUS AND DEPRIVED THE DEFENDANT WARE OF HIS SUBSTANTIAL RIGHTS.

The Court instructed the jury after both sides had closed and the attorneys had argued the case to the jury (T 896-915). Next the Court called counsel to the bench, and gave them an opportunity to object to the charge (T 915-6). After hearing objections the Court gave an additional requested instruction concerning alibi, then of its own volition gave the jury this parting instruction prior to its retirement:

Ladies and gentlemen, your verdict must be the considered judgment of each Juror. In order to return a verdict, it's necessary that each Juror agree on the verdict. Your verdict must be unanimous. Although the verdict must be the verdict of each individual Juror and not a mere acquiescence in the conclusion of your fellow Jurors. You should examine the question submitted with candor and with proper regard and deference to the opinions of each other. You should listen to each other's arguments with a disposition to be convinced. If the larger number of Jurors are for conviction, a dissenting Juror should carefully consider whether his doubt is a reasonable one when it makes no impression upon the minds of so many Jurors honest and equally intelligent as him or herself. On the other hand, if the majority are for acquittal, the minority ought to ask themselves and carefully consider whether they might not reasonably doubt the correctness of their judgment which is not concurred in by the majority. (T 917)

The instruction is a portion of the so-called Allen or dynamite charge. Allen v. United States, 164 U.S. 492 (1896).

It is recognized that this Court has within the past few years considered the Allen charge, and held it not to be objectionable per se when substantially confined to the phraseology of the Allen case, and when used for the purpose of encouraging a deadlocked jury to reach a verdict if it can conscientiously do so. Fulwood v. United States, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966). However, the defendant Ware urges this Court to once again examine the matter, as was done just a few months ago by the Court of Appeals for the Third Circuit in the landmark case of United States v. Fioravanti, 412 F.2d 407 (3d Cir., 1969), and for this Court to put the matter to rest by declaring the simple truth that the verdict of a majority is less than what the law requires in a Federal criminal case and it is error for a court to in any way urge a jury to return the verdict of a majority of its members whether for conviction or acquittal.

Even if this Court does not see fit to declare the Allen charge to be objectionable per se as is now the case in the Third Circuit, it is the contention of the defendant Ware that for a long time this Court has recognized the coercive effect of the charge when either its content or the manner of its use departs from the language and facts of

the Allen case. As put by this Court in Moore v. United States, 120 U.S. App. D.C. 203, 345 F.2d 97 (1965),

"since the charge is potentially coercive, its content and manner of use deserve scrutiny." 345 F.2d, at 98.

In the case at hand, the District Court went past a general homily or verity in order to specifically emphasize majority rule. In Fulwood, supra, the Court had apparently requested the jury in its original charge "to keep an open mind and to weigh the arguments of their peers", 369 F.2d, at 962. Then, after the jury had become deadlocked the full Allen charge was given.

The defendant Ware contends that the manner in which the partial Allen charge was used was coercive. The jury had not even retired to consider its verdict when it was given an instruction appropriate only for a deadlocked jury under the Allen case. Or, to put it in the words of the Court of Appeals for the Fifth Circuit in Green v. United States, 309 F.2d 852 (5th Cir., 1962), ". . . the dynamite exploded before there was any reason to think that blasting was necessary." 309 F.2d, at 856. Coming at that particular time, the instruction placed an undue emphasis on the need for the minority to listen to and to be swayed by the majority. In other words, coming before the jury retired when it was not known whether the jury might disagree, it in effect directed the jury to travel the road of verdict

by the majority thereby avoiding disagreement. The "potential coerciveness" which is the continual concern of this Court whenever called upon to review an Allen charge, is an accomplished fact in this case. The District Court explicitly told the jury members to individually distrust one's judgment if such person found a large majority of the jurors taking a view different from his. When such emphasis comes ahead of even a hint of disagreement, such emphasis upon the correctness of the majority is coercive on the minority.

Again, quoting the Court of Appelas in the Green case, supra,

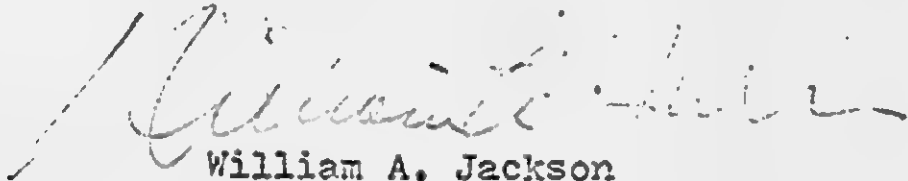
The Allen or "dynamite" charge is designed to blast loose a deadlocked jury. There is small, if any, justification for its use. (309 F.2d, at 854)

There was no justification whatsoever for its use in the case at hand. It cut off dissent before dissent could occur. Its use deprived the defendant Ware of his substantial rights, namely the right of an accused to a hung jury and a mistrial.

CONCLUSION

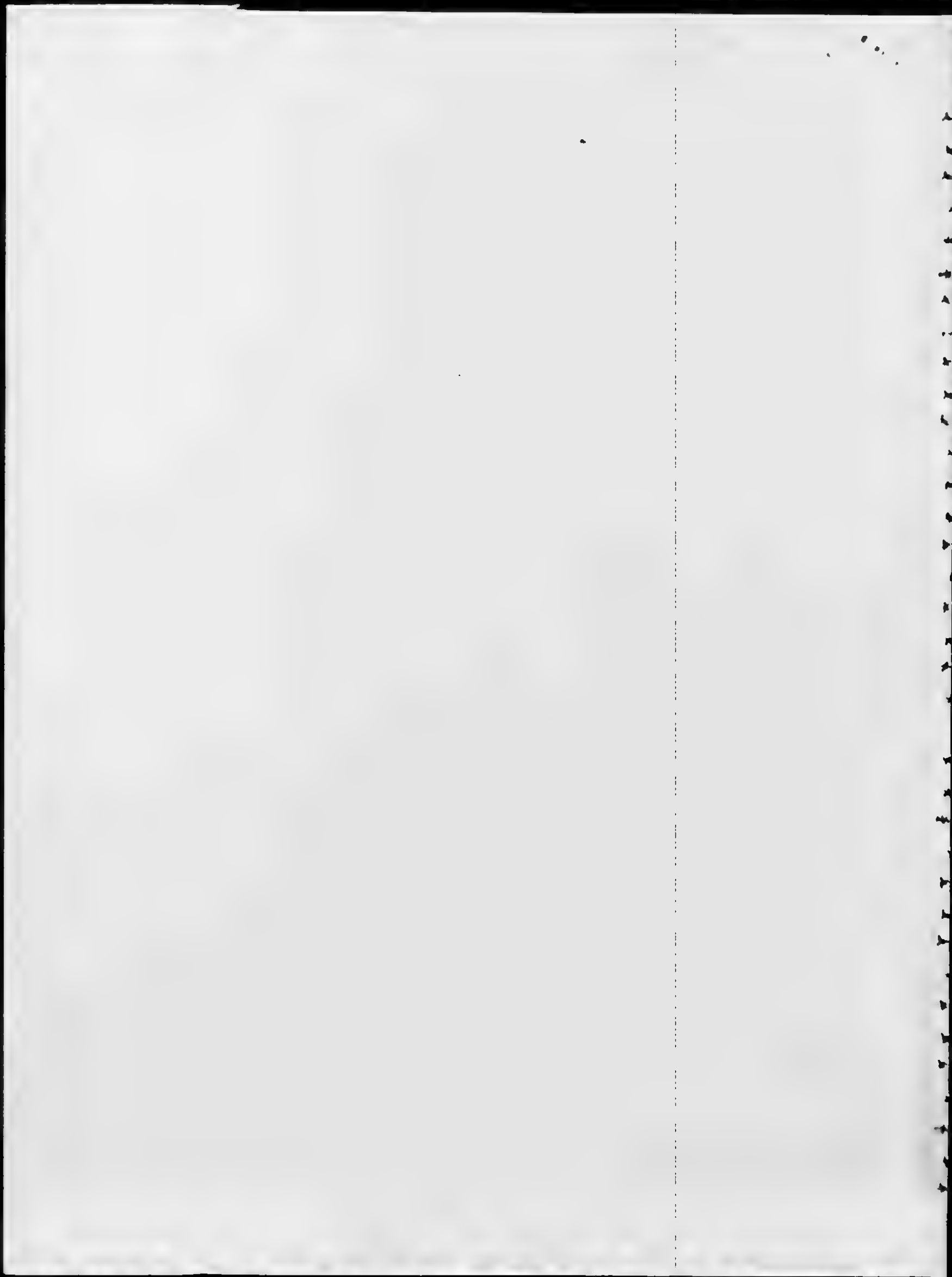
The judgment of conviction of Theodore Ware entered by the District Court should be reversed with instructions to dismiss the indictment upon which he was tried as to such defendant.

Respectfully submitted,



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(Appointed by this Court)



BRIEF FOR APPEAL

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 2221

UNITED STATES OF AMERICA, APPELLANT

WILLIAM A. RINES, APPELLEE

No. 2221

UNITED STATES OF AMERICA, APPELLANT

THEODORE M. WARE, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Presented for review by the
Department of Justice

U. S. DEPT. OF JUSTICE

FILED APR 2 1910

THOMAS A. FLANNERY,

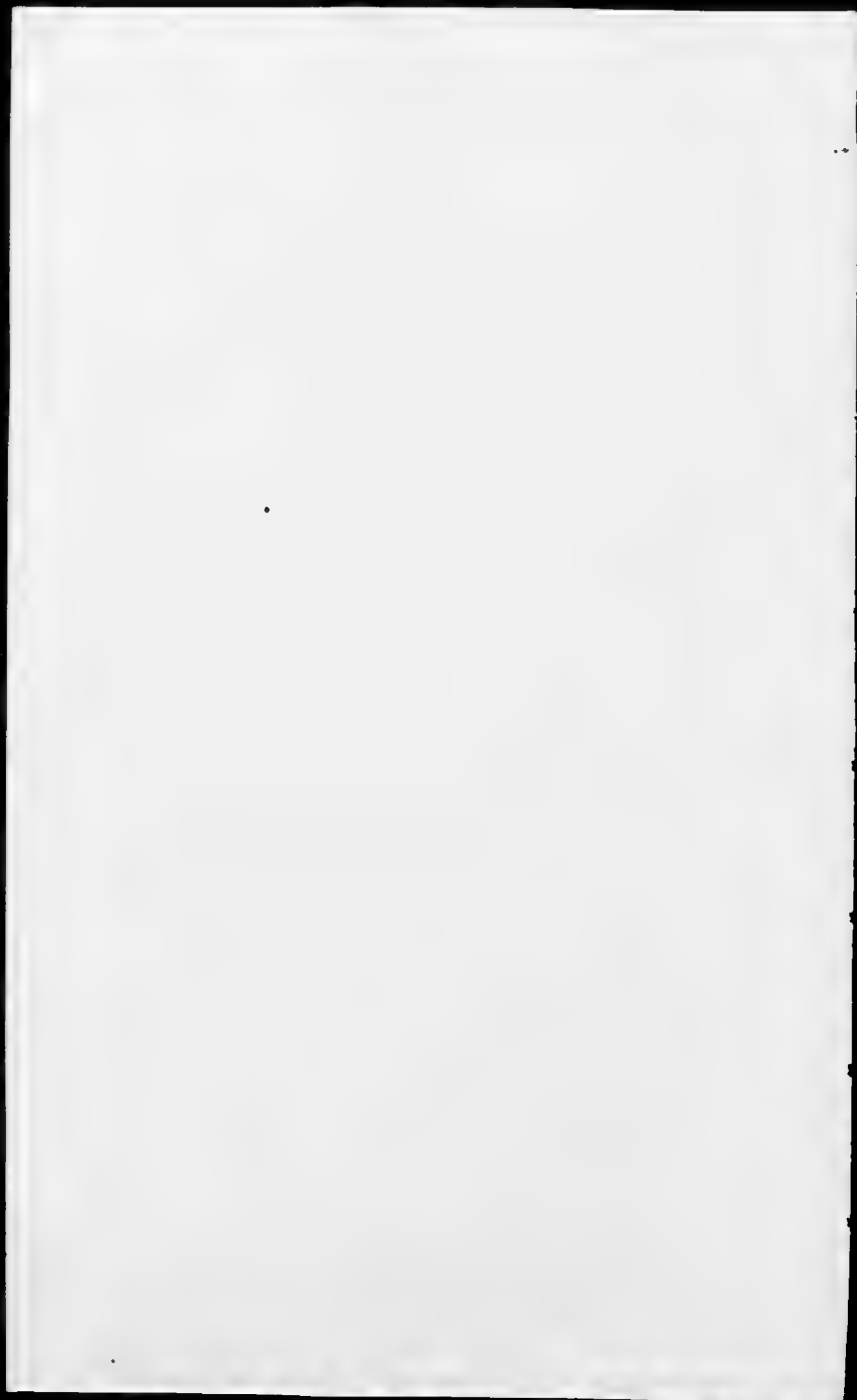
Attorney General.

JOHN A. TERRY,

Assistant Attorney General.

JOHN O'B. CLARK, JR.,

Assistant United States Attorney.



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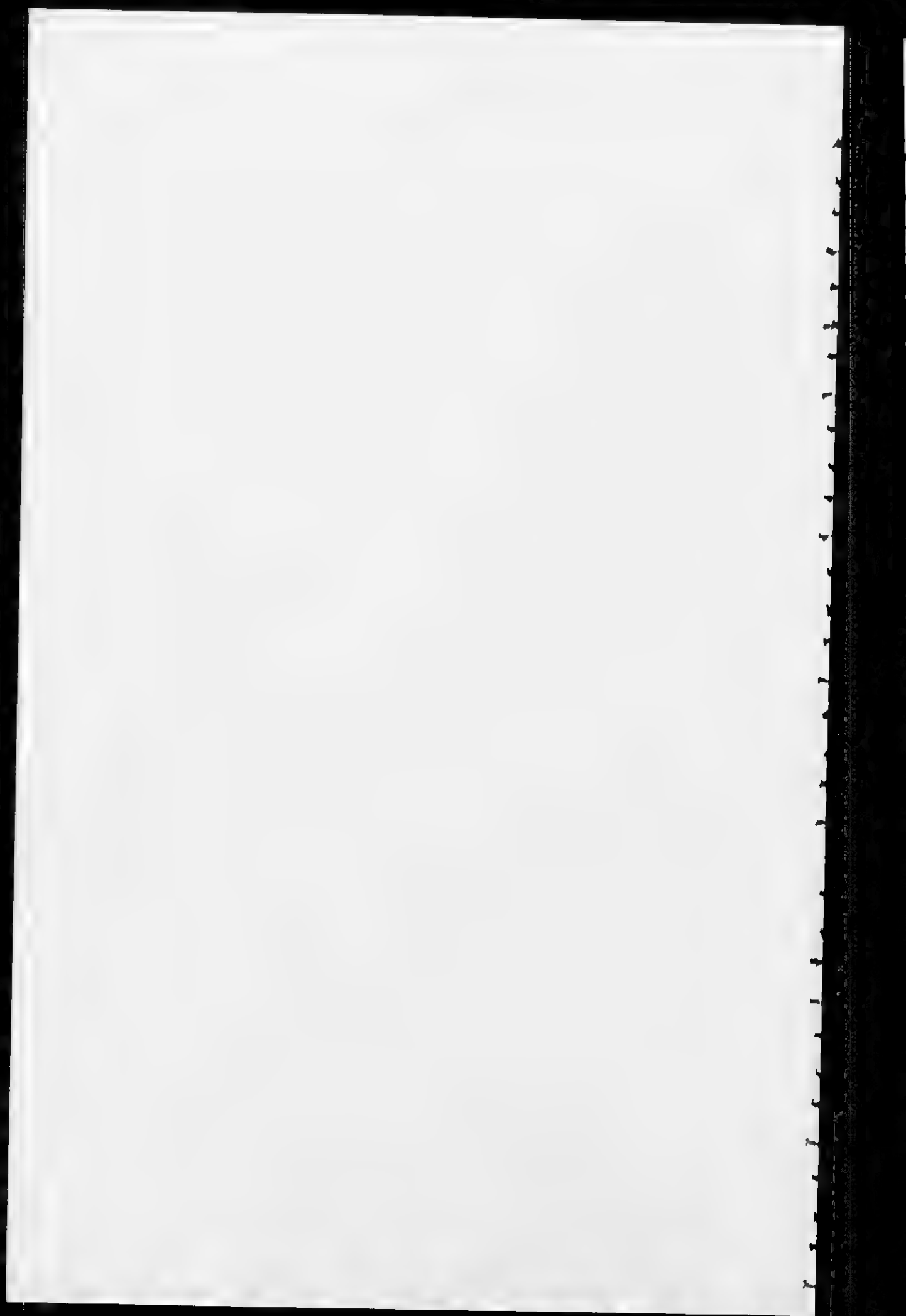
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ISSUES PRESENTED *

In the opinion of appellee the following issues are presented:

- I. Whether appellants were lawfully arrested by the police, when:
 - (a) Appellant Hines was observed running in a suspicious manner from the area in which the crime was committed, moments after a radio report of the crime was broadcast, and further justified his apprehension by submissively and unexpectedly entering the police car; and
 - (b) Appellant Ware was arrested shortly after the robbery in appellant Hines' home, just a few blocks from the scene of the crime, the arresting officers having observed him entering that home and having noticed that he matched the description of one of the robbers.
- II. Whether the police properly conducted an on-the-scene showup of a man who had been detained minutes after the crime but who did not yet have an attorney appointed for him; and whether a subsequent lineup conformed to due process standards.
- III. Whether the trial court properly refused to strike eyewitness testimony under the Jencks Act, 18 U.S.C. § 3500, when there was no showing that the requested materials were "statements," nor any indication that they were destroyed in bad faith.
- IV. Whether appellants were afforded a fair trial where the trial court remained in control of the trial's progress.

* This case was before this Court, as to appellant Hines only, on an appeal by the Government from the granting of a pre-trial motion to suppress evidence. *United States v. Hines*, No. 22,694. The case was remanded to the District Court on the Government's motion.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,281

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIAM A. HINES, APPELLANT

No. 23,391

UNITED STATES OF AMERICA, APPELLEE

v.

THEODORE M. WARE, APPELLANT

**Appeals from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants were charged by a fourteen-count indictment
filed on January 31, 1968, with robbery (two counts),

assault with a dangerous weapon (five counts each) and carrying a pistol without a license (one count each) in violation of 22 D.C. Code §§ 2901, 502 and 3204, respectively. Appellants filed motions to suppress evidence in that case, Criminal No. 106-68, and District Judge Luther W. Youngdahl conducted an evidentiary hearing on September 20, 25, 26, 27 and 30, 1968, before taking those motions under advisement. On November 26, 1968, Judge Youngdahl suppressed identifications of appellant Hines but substantially denied appellant Ware's motions. The Government appealed from that decision and the appeal was docketed here as No. 22,694. On the Government's motion that case was remanded to the District Court on April 16, 1969. Judge Youngdahl reconsidered his earlier decision and on April 28, 1969, vacated his prior ruling and denied appellant Hines' motions.

On October 30, 1968, a new eight-count indictment was filed charging appellants and Edward Hines with the same robbery and assault offenses. Edward Hines was the only one charged with a violation of 22 D.C. Code § 3204. On November 15, 1968, the indictment in Criminal No. 106-68 was dismissed on the Government's motion. Appellants and Edward Hines were tried before Judge John H. Pratt and a jury on June 3, 4, 5, 6, 9 and 10, 1969, after the trial court, on the Government's motion, dismissed the assault charges. The jury acquitted Edward Hines but found appellants guilty of the two robbery counts that were submitted to them. On June 27, 1969, appellant Hines was sentenced to concurrent terms under the Youth Corrections Act, 18 U.S.C. § 5010(b), while appellant Ware was sentenced to concurrent terms of imprisonment of from two to six years. These appeals followed.

The Robbery

On December 18, 1967, two men entered the P.J. Walshe real estate office at around 2:20 p.m. That office, which is located at 1115 I Street, N. W., has a main room that is divided by a counter with swinging gates at either end. There is a hallway leading from the front entrance

to a doorway into the main room and another hallway leading from the main room into a rear office (Tr. 155-58).¹ At the time of this offense three employees were working behind this counter, Mrs. Doris Boggs, Mrs. Katherine Heelen and Mrs. Betty Ricketson, while Mr. Bart Walshe and Mr. William Gateau were walking from the rear office toward the main room (Tr. 155, 263, 337). One of the men walked over to Mr. Walshe and his companion, pointed a pistol at them, asked where "it" was, and apparently told them to lie on the floor before he began to walk into the rear room (Tr. 159). Meanwhile the second man had entered the counter area by the opposite gate, proceeded to walk over to the safe, and while standing in front of the safe asked Mrs. Boggs where the safe was (Tr. 265). That man was also armed (Tr. 158-59).

The first man returned to the main room while the second man was ransacking the safe (Tr. 266), and apparently the first man then grabbed Mrs. Ricketson by the arm and ordered her to open the cash drawer in the counter (Tr. 339). Mrs. Ricketson complied and placed the money in a bag he gave her (Tr. 340). After checking all the drawers that man returned to the safe area (Tr. 268). While the first man was gone, Mrs. Boggs managed to set off the silent alarm (Tr. 268). After the first man returned to the safe area, the second man walked over to Mrs. Heelen and ordered her to get up, threatening her if she did not hurry (Tr. 161, 341). He then took both Mrs. Heelen and Mrs. Ricketson back to the safe (Tr. 269). Mrs. Boggs tried to delay the men by giving them the keys and telling them to open the safe (Tr. 268). Finally the drawers were opened, and as the robbers were checking the drawers, a

¹ The following abbreviations will be used to designate the different transcripts: "Tr." for the trial transcript, "H. Tr." for the transcript of the hearing on the motions to suppress in September 1968, and "P.H.Tr." for the transcript of the January 5, 1968, preliminary hearing. Exhibits will be identified as "Ex." for trial exhibits and "H.ex." for hearing exhibits.

third man came in and said, "Here comes the police" (Tr. 270, 341). All three men then ran through the hallway into the rear office and apparently climbed out a window in that room, leaving behind them the \$146 they had taken, an umbrella, a pistol, and a fingerprint (Tr. 164, 282, 592). The pistol was found in a chair beside one of the counter gates that the third man climbed over (Tr. 355-56), whereas the remaining articles were discovered in the rear room. The robbery was estimated as having taken ten minutes (Tr. 335).

The Apprehensions

Officer Marshall Wilson of the Second Precinct, Metropolitan Police, heard a radio flash for a robbery at 1115 I Street on December 18, 1867, while he was waiting for a traffic light to change at Massachusetts Avenue and 10th Street, N.W. He immediately turned south onto 10th Street and drove his one-man scout car to K Street, where he made a right turn, heading west on K (Tr. 434). When he arrived near 11th and K Streets, he saw two men running diagonally across K Street heading north towards the corner of 11th and K (Tr. 434, H. Tr. 51). The men were running from the middle of the block between 11th and 12th Streets, on the south side of K (Tr. 435, H. Tr. 82), and were looking continually over their shoulders back at the area from which they were running (Tr. 436, H.Tr. 86). Officer Wilson turned his car north on 11th Street and then blocked the path of one of those men by making a left turn on 11th Street, stopping adjacent to a parked car (H.Tr. 53). One of the men continued fleeing, running through an alley on the east side of 11th Street, while the other man walked around the scout car, entered it and then closed the door (Tr. 439). The officer testified:

Q. [by the prosecutor]: Had you said anything to him at this point?

A. I had said nothing to him.

Q. When he opened that door and got inside the scout car, what happened then?

A. I asked him what he wanted.

Q. What did he say to you?

A. At this time he said he was tired of running. . . .

A. I asked him what he was running for, at which [he] made no statement. (Tr. 439-40; *accord*, H.Tr. 78.)

That man was appellant Hines (Tr. 439).

Officer Wilson at this point had not received a description or information as to the perpetrator or perpetrators of the offense (H.Tr. 52). With the help of other officers that arrived on the scene, Officer Wilson had appellant get out of the car, possibly patted him down, handcuffed him and replaced him, by himself, in the back of the scout car (H.Tr. 54-55). Appellant was not under arrest according to Officer Wilson, for "[h]e was a suspect, I was alone in the scout car, I didn't know if he was armed or not. For my safety I would rather put him behind me handcuffed." (H.Tr. 55.) Appellant was then transported to the scene of the robbery, where he was identified by the victims as one of the culprits (H.Tr. 61). On the way back to the scene, Officer Wilson heard a partial description of the felons (H.Tr. 58) and made the following reply to the dispatcher: "Those are the ones I saw, wearing a light blue suit, went thru the alley towards 10th St. in the 1000 block. Also the one in raincoat." (Gov't H.ex. 10,p.2.)

Detective Patrick T. Lanigan of the Metropolitan Police arrived at 1115 I Street around 2:30 p.m. and noticed appellant Hines in custody (H.Tr. 179). Detective Lanigan had known appellant and his brother, Edward, for a few years, having previously arrested Edward Hines for a pickpocket offense (H.Tr. 176). Lanigan asked appellant if his brother was also involved in the holdup, but appellant refused to answer (H.Tr. 176). At this time Detective Lanigan had heard that two suspects had fled in an easterly direction and that there was a general description, which fit Edward Hines (H.Tr. 184). Lanigan also knew that both appellant and Edward Hines

lived at 906 K Street, N. W., which was three blocks east of the robbery scene (H.Tr. 176). The detective decided to check the Hines' home. As he was leaving 1115 I Street, he met Lieutenant Samuel Wallace and told him of his suspicions (H.Tr. 155). Both officers, along with a few uniformed men, then went to 906 K Street. When they arrived there at approximately 2:50 p.m., they met Officer Edwin E. Frye, who was in a one-man scout car (H.Tr. 177).

Officer Frye had arrived at the robbery scene in time to see one man fleeing north in an alley (H.Tr. 258) and heard from Officer Thomas J. McFarland that there were two others involved (H.Tr. 254). After obtaining a partial lookout (H.Tr. 255, Tr. 567-68) he cruised the area, but he saw no one who fitted the description until he arrived at 906 K Street (Tr. 575). At that location he noticed a Negro male with a black raincoat (H.Tr. 156) enter the front yard and continually look at his scout car (H.Tr. 261). That man entered 906 K Street. Officer Frye was about to call for assistance when Detective Lanigan and Lieutenant Wallace arrived (H.Tr. 257). Frye then told the other officers what he observed, that he "had seen a subject going in that door that fitted the description we were looking for" (H.Tr. 257).

After talking with Officer Frye, Lieutenant Wallace and Detective Lanigan approached the house. Mrs. Irene Hines, appellant Hines' mother, answered their knock. In response to her inquiry as to what they wanted, Lieutenant Wallace said, after identifying himself, that a man had entered her house and that they were looking for a holdup suspect (H.Tr. 157). Mrs. Hines replied that the only person in her house was a boy she knew as Michael (H.Tr. 157). According to the officers, Mrs. Hines invited them into her home (H.Tr. 157, 187), possibly because she did not want the neighbors to know what was happening (H.Tr. 187). Mrs. Hines testified that the officers asked for "Eddy" and just entered

(H.Tr. 142).² Once inside the hallway, Detective Lanigan heard a noise at the top of the stairs near him and observed appellant Ware place a black raincoat on the banister and walk down the stairs (H.Tr. 178, Tr. 557). Lanigan asked appellant, who fitted the description, what his name was, but appellant refused to answer (H.Tr. 178). Appellant was arrested.

The Identifications

Appellant Hines was transported to the robbery scene by Officer Wilson, arriving there shortly after 2:30 p.m. (H.Tr. 59). As he was being brought into the main room of the real estate office, four witnesses, without being asked, stated "That is the one." (H.Tr. 62.) Officer Wilson stated he observed two men and two women make that identification (H.Tr. 65, 87). Appellant was wearing a hat, a knee-length dark gray checkered coat and a dark gray suit as he was ushered handcuffed into the main room (Tr. 438). Wilson testified, contrary to appellant, that he did not remember anyone asking appellant to say something or see anyone straightening appellant's hat (H.Tr. 62-63). After the witnesses identified appellant, Officer Wilson took him into the hallway, where they met Detective Sergeant Thomas P. Reilly, the officer in charge of the case (H.Tr. 64). Detective Sergeant Reilly decided to conduct another confrontation in order to obtain a clear view of the identifications (H.Tr. 65). Reilly possibly instructed the witnesses to refrain from commenting until appellant was subsequently removed from the room, and then ordered appellant brought into the main room (H.Tr. 94). Appellant was escorted by Officer Wilson into the room, which contained two or three policemen besides the four witnesses (H.Tr. 92). All of those witnesses recognized appellant, although Reilly was unaware of Mrs. Boggs' ability to identify appellant

² Judge Youngdahl resolved this conflict in the testimony by finding that the Government failed to show consent (Memorandum opinion at 19 n. 23).

(Tr. 492). Appellant was then transported to the Robbery Squad office (H. Tr. 74).

A lineup was conducted around 6:30 p.m. that same day at the Robbery Squad headquarters. Mr. Edwin A. Williams,³ an attorney on the staff of the Legal Aid Agency, was present (H.Tr. 97). The lineup consisted of six negro males and was rearranged once after the first of three witnesses viewed it (H.Tr. 103). It was composed of four police officers, including Officer Wilson, besides the two teenaged appellants, and all wore dark raincoats (H. Tr. 70). A picture of the lineup, with the participants in the same order as seen by the first witness, Mrs. Ricketson, is included in the record on appeal. Appellant Hines was, from the left side, in the second position, Officer Wilson was in fourth place, and appellant Ware was to Wilson's right. It should be noted that there is a difference in ages, weight, height, and mustaches.

Each witness viewed the lineup separately (Tr. 94). Both Mr. Walshe and Mr. Gateau recognized appellant Hines (H.Tr. 234, 289), while Mr. Gateau and Mrs. Ricketson identified appellant Ware (H.Tr. 289, 198). Before viewing the lineup, the witnesses may have been informed by Detective Sergeant Reilly to look for the second culprit (H.Tr. 107). Mrs. Ricketson explained that she did not identify appellant Hines because she believed she was only to identify the man who had not been brought back to the scene (Tr. 351-52).

In the interval between the lineup and the hearing on the motion to suppress nine months later, the four eyewitnesses viewed Detective Sergeant Reilly's case folder and the pictures of appellants that were contained in it. One picture was of the lineup, and three others were two individual color pictures of appellants and one color picture of them together. The witnesses stated that they viewed those pictures out of curiosity and in order to get the faces of the culprits straight with their names (H.Tr. 219, Tr. 382). When Mrs. Boggs asked to see

³ Mr. Williams represented appellant Ware from the preliminary hearing until conviction.

those pictures before her grand jury testimony, she pointed to appellant Ware's picture and said he was the one without the hat (H.Tr. 268).

At both the hearing and at the trial, the four eyewitnesses were able to describe in detail what the two felons inside the office were wearing and what they looked like. Mr. Walshe, who could identify only appellant Hines, testified that Hines was the man with a wool hat with the brim turned up, wearing a three-quarter length dark plaid overcoat and dark pants. He identified appellant Hines as the man who threatened his sister, Mrs. Heelen (H.Tr. 230-32, Tr. 161). Mrs. Ricketson described the same clothes and stated that appellant Hines was approximately nineteen to twenty years old, five feet nine inches tall, of average build, with a fuller face and darker complexion than the first man (H.Tr. 195-96, Tr. 343). Mrs. Boggs reiterated that description (H.Tr. 266, Tr. 274), as did Mr. Gateau, but in less detail (Tr. 199). Both Mr. Walshe and Mrs. Ricketson observed appellant Hines very carefully in the good lighting conditions of the office as he was threatening Mrs. Heelen (Tr. 161, 347), while Mrs. Boggs had her best view of appellant when he was at the safe (Tr. 272-73). Appellant Ware was described as being around five feet nine inches, of slender build, approximately nineteen to twenty years old (in his early twenties according to Mrs. Boggs (H.Tr. 265)), and of a lighter complexion than appellant Hines (H.Tr. 198). Appellant Ware was observed wearing a dark raincoat, light pants, and a light-colored shirt open at the neck (H.Tr. 225, 281, Tr. 197, 272). His hair was apparently worn in a bush style, but a "widow's peak" was noticeable, according to Mrs. Boggs (H.Tr. 199, 265).

During direct examination at trial the Government introduced evidence of the pre-trial confrontations by eliciting from the four eyewitnesses the facts that appellant Hines was returned to the scene and that a lineup was subsequently held. Mrs. Ricketson testified about the first confrontation (Tr. 349) and the lineup at which she identified only appellant Ware (Tr. 351) and then made in-

court identifications of both appellants (Tr. 346, 349). Mr. Walshe likewise testified about the initial on-the-scene confrontation (Tr. 166) and the lineup where he observed only appellant Hines (Tr. 168) and concluded by making an in-court identification of appellant Hines (Tr. 162). Mrs. Boggs related the events of the on-the-scene viewing (Tr. 276), made an in-court identification of appellant Hines (Tr. 275), and described appellant Ware's dress during the crime (Tr. 272). Mr. Gateau, however, while he testified about the first confrontation and the lineup, could not accurately identify appellants in court (Tr. 199). On cross-examination appellants brought out the fact that some of the witnesses had viewed photographs of appellants (Tr. 315, 381).

Officer Clayton E. Keys of the Metropolitan Police Identification Section testified that he arrived at 1115 I Street on December 18 at around 3:20 p.m. and checked the premises for latent fingerprints (Tr. 591). He found seven latent prints on the glass-top desk in Mr. Walshe's rear office (Tr. 592). Those prints were lifted and transferred to a piece of paper. Officer Keys also processed appellant Ware on December 18, 1967, and during that procedure took appellant's fingerprints (Tr. 594-95). Mr. Edward J. Dion, a fingerprint examiner for the Metropolitan Police, compared one of the latent prints found by Officer Keys with a print of appellant Ware's left little finger, and after finding twelve identical points of comparison he concluded that the latent print was made by appellant (Tr. 599).

The Defenses

Appellants' main defense was to attack the admissibility of the evidence, contending that they were illegally arrested, that the confrontations violated their Sixth Amendment right to counsel and were contrary to due process of law, and finally that the testimony of the identification witnesses should have been stricken under the Jencks Act, 18 U.S.C. § 3500. Judge Youngdahl considered the first two assertions, conducted an evidentiary

hearing and, after the filing of numerous memoranda by both parties, found the arrests to have been valid and the lineup proper. However, he found that the on-the-scene showup was improper because of the police's failure to have a lawyer present. He also held that Mrs. Boggs could not make an in-court identification of appellant Ware because her viewing of photographs violated due process, and there was no showing of an independent basis for an in-court identification. After this Court decided *Russell v. United States*, 133 U.S. App. D.C. 77, 408 F.2d 1280, cert. denied, 395 U.S. 928 (1969), this Court on the Government's motion remanded this case, and Judge Youngdahl reconsidered his prior ruling. He then held that the on-the-scene confrontation was proper.

During the trial, appellants attempted to question the reliability of the eyewitnesses' testimony by using the preliminary hearing, Grand Jury, and suppression hearing transcripts as impeachment devices. They also tried the same tack on the police officers by using the Jencks statements in addition to their prior testimony.

Appellant Hines introduced in his own defense testimony of his reputation for peace and good order by presenting three witnesses, Mr. David Brown, Mrs. Virginia Cochran, and Mr. Andrew H. Ranson. Those witnesses knew appellant from their association with him at the New York Avenue Presbyterian Community Club. Appellant did not testify.

Appellant Ware testified on his own behalf and presented an alibi defense. He stated that he went over to appellant Hines' house the morning of December 18 and stayed there after appellant and his mother left (Tr. 675). After waiting around an hour or so, he decided to leave around 1:00 p.m. and started to walk home (Tr. 690). When he reached the library on New York Avenue, he noticed that his wallet was missing (Tr. 691). He turned around and returned to appellant's home, where he spoke to Mrs. Hines (Tr. 676). Mrs. Hines and appellant had a conversation about her car, and after checking the car they both returned to the house (Tr. 677).

After entering the house appellant used the telephone with Mrs. Hines' permission (Tr. 678). He then asked to use her bathroom and proceeded up the stairs, leaving his black raincoat on the banister (Tr. 700). When he was upstairs he heard the police enter, and as he walked down the stairs he was arrested (Tr. 680-81).

Mrs. Irene Hines, appellant Hines' mother, testified on appellant Ware's behalf. She related that after returning from lunch and going home, she observed appellant Ware enter her yard and start for the basement (Tr. 753). After he asked for the key (Tr. 753, *contra*, Tr. 696), appellant and Mrs. Hines walked over to her car to check it (Tr. 754). Both then returned to the house, and appellant asked if he could use the phone (Tr. 755). At that time the police knocked at her door (Tr. 755). As the police entered Mrs. Hines thought appellant was still on the phone, but when she turned around he was not there (Tr. 768).

The Verdict

After arguments and instructions, including an unobjected to *Allen*-type charge,⁴ the jury retired to deliberate at 4:49 p.m. on June 9, 1969. At 6:06 p.m. they were excused until 9:30 a.m. the next day. The jury completed their deliberations on June 10, 1969, and returned to court at 11:44 a.m. At that time the following occurred:

DEPUTY CLERK: What say you to the Defendant, William Hines on Count One?

FOREMAN: William Hines, we find guilty.

DEPUTY CLERK: On Count Two?

FOREMAN: I'm afraid there's a misunderstanding here.

THE COURT: Okay, go back in the Jury room and straighten it out. (Tr. 923.)

The jury returned at 11:59 a.m. with verdicts of guilty as to both appellants on both counts, but not guilty as to

⁴ *Allen v. United States*, 164 U.S. 492 (1896).

Edward Hines on all counts (Tr. 924). Those verdicts were reiterated by a poll (Tr. 925-28) at appellants' request.

ARGUMENT

- I. Appellants were lawfully detained since the police responses were reasonable in light of the information the officers possessed and the need for immediate action as balanced against the resulting intrusions upon appellants' personal security.

(H.Tr. 50-91, 155-91, 173-91, 252-62);
(Tr. 433-41, 553-62, 566-77).

Appellants urge this Court to overrule the hearing court's determination that their arrests were valid. Appellant Hines contends that his street arrest was without probable cause and that therefore the subsequent on-the-scene identification was the product of an illegal arrest. Appellant Ware seeks to exclude his fingerprint identification by asserting that the police lacked authority to enter Mrs. Hines' house and that they failed to possess the requisite probable cause to arrest him. We submit that the record amply refutes the arguments of both appellants.

A. The police acted reasonably in detaining appellant Hines.

It is axiomatic that an arrest is valid if the police officer has probable cause to believe that a felony has been or is being committed and that the person to be arrested has committed or is committing that offense. *E.g.*, *Carroll v. United States*, 267 U.S. 132, 162 (1925). In determining whether an officer was armed with the requisite probable cause, the question to be considered is whether he had knowledge of facts and circumstances which would, together with his expertise gained through training and experience, warrant a reasonable and prudent man in believing that appellant had committed an offense. *E.g.*,

Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958). As appellant notes, the actions of the police must be judged by the information that the officer possessed at the moment that he acted. Subsequent knowledge may not operate retroactively to validate his actions, nor, we submit, should those events vitiate his responses. *Beck v. Ohio*, 379 U.S. 89 (1964); *Henry v. United States*, 361 U.S. 98 (1959). It must also be remembered that probable cause is a plastic concept, and as the very name implies, we are concerned not with certainties but with probabilities. In making any determination a police officer, and *a fortiori* a reviewing court, should use the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

In the case at bar, Officer Wilson was responding to a holdup radio flash when he noticed two men running from the vicinity of that robbery (H.Tr. 51). Although he did not have any information as to how the crime had been committed or by whom, he noticed that those men were the only people on that street running like that and that they were continually looking back at the area they had left (H.Tr. 85-86). Having decided to stop at least one of those men, Officer Wilson blocked the path of appellant by maneuvering his car against a parked car (H.Tr. 53). At this point appellant performed a curious act of submission by walking around to the right rear of the scout car and entering it unsolicited (H.Tr. 53). The peculiar conversation immediately followed (H.Tr. 78). Then Officer Wilson, with the help of additional units, removed appellant from the rear of his car and handcuffed him (H.Tr. 54-55). Officer Wilson received a partial description as he was taking appellant to the scene and responded: "Those are the ones I saw" (Gov't.H.ex. 10 at 2.)

It is obvious that Officer Wilson had probable cause to believe that a crime had been committed, and therefore the only question remaining is whether appellant was reasonably linked to that crime. Although flight is not

always or necessarily an indication of guilt, it is a factor that may be considered in determining probable cause. *Hinton v. United States*, D.C. Cir. No. 22,068, decided October 14, 1969. The hearing court noted this equivocal nature of flight in general, but then stated in its Memorandum and Order at 9:

[T]he running of the two men on a crowded downtown street in the middle of the day, their looking back in the direction of the robbery scene and the proximity of this suspicious conduct in both time and distance to the offense itself, are persuasive factors in establishing probable cause.

In light of this suspicious conduct, the officer had a right and a duty to stop and detain momentarily those two men in order to investigate their possible connection with the crime. *Dorsey v. United States*, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967); *Green v. United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958), *cert. denied*, 359 U.S. 917 (1959). If the officer had failed to take immediate action, an armed felon might have escaped.

After the officer blocked appellant's path in response to his suspicious conduct, appellant added another element to the probable cause determination by entering the scout car and giving a lame excuse for his abnormal behavior. As the suppression court found, "[A]t the time Officer Wilson handcuffed the defendant, 'the facts and circumstances within [his] knowledge . . . were sufficient to warrant a prudent man in believing the [defendant] had committed . . . [the] offense.'" Memorandum and Order at 8-9, quoting from *Beck v. Ohio*, *supra*, 379 U.S. at 91. We maintain that finding was correct.

We submit, however, that this Court need not decide whether probable cause existed at the time Officer Wilson handcuffed appellant, for the officer acted reasonably in momentarily detaining appellant until he was viewed by the victims of the crime. Courts in this jurisdiction and elsewhere have recognized in what may be called "approach-confront-interrogate" cases that the police have a

right to investigate a suspicious situation. *E.g.*, *Green v. United States*, *supra*; *People v. Henneman*, 367 Ill. 151, 154, 10 N.E.2d 649, 650 (1937). But prior to *Terry v. Ohio*, 392 U.S. 1 (1968), search and seizure law in a street confrontation situation had taken on an "all or nothing" appearance; the police could either arrest a suspect or do nothing. *E.g.*, *Henry v. United States*, *supra*; Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46. That type of reasoning had led to courts' watering down the concepts of probable cause and arrest in order to validate situations that were in fact reasonable.

The Supreme Court in *Warden v. Hayden*, 387 U.S. 294 (1967), and *Camara v. Municipal Court*, 387 U.S. 523 (1967), began to lay the groundwork for a more realistic view of the Fourth Amendment protections that was spelled out in *Terry v. Ohio*, *supra*. That approach is one of reasonableness. We submit that in light of those cases particularly *Terry*, the proper approach is to balance the information that the police possess and the need for immediate action against the intrusion upon a person's personal security. In a determination of the validity of the police response, the test is one of reasonableness of both the officer's action at its inception and of reasonableness of the scope of that response in relation to the circumstances which necessitated it. *Terry v. Ohio*, *supra*, 392 U.S. at 20.

Under this test Officer Wilson clearly had a right to stop appellant. After appellant entered the scout car and gave his pathetic replies, which only served to increase the officer's suspicions, the officer could not have let him go. He tried to obtain additional information but none was available (Gov't H. ex. 10 at 1-2), so he decided to return to the scene. On the way there the officer received an additional description which, contrary to appellant's contention (Appellant Hines' Br. at 37), only increased his belief in appellant's complicity. Appellant was handcuffed because, as the officer explained (H.Tr. 55), he did not know if appellant was armed. At the scene ap-

pellant was identified, and at that point Officer Wilson was certain of appellant's guilt (H.Tr. 80). In light of the necessity for immediate action, Officer Wilson had to detain appellant. Appellant suggests that instead of taking appellant immediately to the scene either to clear or to implicate him, the police should have detained him at the station house until a lineup was conducted (Appellant Hines' Br. at 39). We submit that the most appropriate course of action open to the officer was the one which he followed: he detained a possible felon and expeditiously determined his complicity. It would have been a far greater intrusion upon appellant's personal security to have detained him until the lineup. See *Davis v. Mississippi*, 394 U.S. 721 (1969); *Russell v. United States*, 133 U.S. App. D.C. 77, 408 F.2d 1280, cert. denied, 395 U.S. 928 (1969).

B. Appellant Ware's arrest was lawfully effectuated.

We submit that the combination of Detective Lanigan's and Officer Frye's knowledge justified the police in seeking entry into Mrs. Hines' house. Once they observed appellant inside that home, the officers were armed with a sufficient quantum of information to arrest him.

Lieutenant Wallace and Detective Lanigan, we admit, did not have probable cause to arrest appellant when they left the robbery scene. Lanigan knew that appellant Hines and his brother lived in the near vicinity and apparently hung around together (H.Tr. 176). He was also cognizant of the fact that the other man who had been with appellant Hines had continued fleeing east (H.Tr. 177) and that one of the culprits was described as being tall and slim, as was Edward Hines (Tr. 556). When the officers arrived at 906 K Street, around 2:50 p.m., approximately twenty to twenty-five minutes after the culprits had escaped, they met Officer Frye (H.Tr. 156). Officer Frye had been cruising the area looking for the suspects and had recently observed a man who fit the description he had (H.Tr. 257). While that description

appeared to be only that of a Negro male wearing a black raincoat, from the record it is reasonable to infer that it was much more detailed. Officer Frye was examining the crowded downtown area on, as appellant alleges (Appellant Ware's Br. at 30), a rainy day, but yet he failed to see anyone matching that description until he noticed appellant (Tr. 575). It must also be remembered that the officer had obtained a partial description from the witnesses (Tr. 567-68), besides having actually observed one of the fleeing felons (H.Tr. 258).

When the officers conferred outside the Hines' house, Officer Frye told the newly arrived police that he had observed a man who fit the description enter 906 K Street. The officers, who we submit had probable cause to believe that that man was involved in the robbery, proceeded to approach 906 K Street. Since the police were fresh on the trail of a felon and since they were not sure of his identity, they had to act immediately or forever lose the scent of an armed robber. If they did not act immediately, the suspected proceeds of the crime or the weapon used to commit that offense might have been lost for all time. In other words, if the police did not respond at once and pursue the hot trail, they might never have received another chance. *Warden v. Hayden, supra; Chappell v. United States*, 119 U.S. App. D.C. 356, 342 F.2d 935 (1965).

Appellant, relying on *Jones and Dorman v. United States*, D.C. Cir. Nos. 21,664, 21,736, decided May 5, 1969,⁵ questions the police entry into Mrs. Hines' house since they did not possess a warrant. However, we do not understand how appellant may question the entry, because in our view he does not have standing to object to an entry into someone else's premises. Although *Jones v. United States*, 362 U.S. 257 (1960), indicates that anyone legitimately on the premises may object to a search,

⁵ The opinion in *Jones and Dorman* was vacated on July 29, 1969, as to *Dorman*, and the *Dorman* case was reheard by the Court *en banc* on November 24, 1969. Under these circumstances appellant's reference to the original May 5 opinion is, we submit, meaningless.

we suggest that in light of *Katz v. United States*, 389 U.S. 347 (1967), stating that the Fourth Amendment protects a person's expectation of privacy and *Alderman v. United States*, 394 U.S. 165 (1969), holding that standing is still prerequisite to the assertion of a Fourth Amendment claim,⁶ appellant does not have standing to question the manner of entry into the house in which he was momentarily present. Since appellant could not reasonably expect that Mrs. Hines would not allow anyone else in her house, we submit he did not have a reasonable expectation of privacy that was invaded and thus should not be allowed to assert Mrs. Hines' right.

Assuming *arguendo* that a warrant is necessary in order to enter, it was not required in this case because of the exigencies of the situation that made speed essential. To have required a warrant under these circumstances would have glorified form over substance and would have served no useful purpose. *Washington v. United States*, — U.S. App. D.C. —, 414 F.2d 1119 (1969); *Chappell v. United States*, *supra*. Although announcement of authority and purpose is not an issue in this case (Memorandum and Order at 19 n.24), we submit that as the need for immediate action and the officers' information increases, the counterbalancing need for a warrant, if there be one, and the requirement and manner of announcing authority and purpose decreases. Again the test is one of reasonableness. Compare *Warden v. Hayden*, *supra*, with *Miller v. United States*, 357 U.S. 301 (1958), with *Bryson v. United States*, — U.S. App. D.C. —, 419 F.2d 695 (1969).

Since the circumstances would have supported a forcible entry, the peaceable entry, even without consent, was proper. Once inside, Detective Lanigan had probable cause to arrest appellant when he noticed him place a raincoat on the banister, for he matched the description of one of the felons, and Mrs. Hines had stated that he was the only one in the house besides her (H.Tr. 157).

⁶ See *Wong Sun v. United States*, 371 U.S. 471 (1963).

II. The District Court properly admitted the eyewitnesses identifications of appellants since the police identification procedures were not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

(H.Tr. 61-73, 92-123, 192-225, 230-32, 265-67.)

(Tr. 161-62, 197-99, 272-74, 342-50, 441-43, 489-528.)

Appellants mount on due process grounds an all-out attack on the identification testimony, contending that each confrontation was so unnecessarily suggestive as to cause irreparable mistaken identification. No doubt the identification procedures used by the police may have contained an element of suggestivity, in that all confrontations containing the actual culprits or persons similar to them are suggestive. But we emphatically reject the assertion that the procedures followed in this case, either individually or as one, were so suggestive as to give rise to a danger of mistaken identification.

In *Stovall v. Denno*, 388 U.S. 293, 302 (1967), the Supreme Court held that a pre-trial confrontation procedure could deny an accused the right to a fair trial if it was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." In determining whether the identification procedures did in fact violate due process, this Court has stated that three questions should be asked: (1) was the challenged confrontation suggestive; if so, (2) was it unnecessarily suggestive; and if unnecessarily suggestive, (3) did it taint the in-court identification? *Gregory v. United States*, 133 U.S. App. D.C. 317, 322, 410 F.2d 1016, 1021 (1969). As we noted above, all confrontations may be suggestive, but yet not so suggestive as to be conducive to irreparable mistaken identification. It is only this greater degree of suggestivity that is possibly violative of due process.

A. The on-the-scene identifications were proper.

Appellant Hines argues that the on-the-scene identifications were unlawful on two basis; first, they were violative of due process; and second, they were secured in the absence of counsel as required by *United States v. Wade*, 388 U.S. 218 (1967). *Russell v. United States*, *supra*, amply refutes both contentions.

Although *Wade* and *Gilbert v. California*, 388 U.S. 263 (1967), involved post-indictment confrontations, the language in those cases appeared to pertain to all identification procedures. See *Mason v. United States*, — U.S. App. D.C. —, 414 F.2d 1176 (1969). The Court, however, left itself room for maneuvering by noting that “[n]o substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel.” *United States v. Wade*, *supra*, 388 U.S. at 237. This Court, when faced with an immediate on-the-scene confrontation in *Russell v. United States*, *supra*, found that there were “substantial countervailing policy considerations” militating against the need for the presence of counsel at such an identification. Although a confrontation in which a single suspect is viewed in the presence of the police is obviously suggestive, the immediate viewing promotes fairness by increasing the potentiality for accuracy and by expeditiously releasing suspects who turn out to be innocent. As this Court recognized in *Bates v. United States*, 132 U.S. App. D.C. 36, 405 F.2d 1104 (1968), a pre-*Wade* confrontation case, an immediate viewing also enables the police to narrow their leads when time is of the essence. We submit that those policy considerations are applicable to this case.

Appellant Hines, while recognizing the teachings of *Russell*, argues that the facts of this case nullify the substantial policy considerations found to be present in *Russell* (Appellant Hines’ Br. at 39-42). He asserts that the alleged lack of a detailed description or a continuous chase require a lineup to be conducted, especially where, as in this case, a lineup could be arranged within a few hours. In effect, appellant is contending that where the

grounds to arrest are very close, the detained individual should be restrained for a greater period. We submit that that argument flatly contravenes one of the justifications for not requiring counsel—releasing an innocent suspect as fast as possible—and also burdens the police at a period when time is critical.

Although counsel was not required to be present at the initial identifications, the viewings must not have been violative of due process. As this Court observed in *Russell v. United States*, *supra*, 133 U.S. App. D.C. at 82, 408 F.2d at 1285, the absence of counsel is one of the many factors to be considered in examining the “totality of the circumstances surrounding” the confrontation. *Stovall v. Denno*, *supra*, 388 U.S. at 302. It should be noted that the accuracy of the identification is not at issue but that the only question is whether the procedures used were unnecessarily conducive to irreparable mistaken identification. *Russell v. United States*, *supra*, 133 U.S. App. D.C. at 82, 408 F.2d at 1285.

In the case at bar, appellant Hines was returned to the robbery scene within minutes after he had fled (Gov’t. H.ex. 10 at 1-2) and was brought handcuffed into a room occupied by the four eyewitnesses and several uniformed police (H.Tr. 61, 239, 273).⁷ Although appellant was handcuffed, the witnesses testified that they could not see his hands because of a counter blocking that view (H.Tr. 211, 242, 273). Officer Wilson related that appellant was identified without prompting as he ushered appellant into that room (H.Tr. 62). And contrary to appellant’s allegation, the witnesses were not in a “state of shock” (H.Tr. 201), for besides having had an opportunity to

⁷ The record is not clear as to how many police officers were in the presence of the witnesses when they viewed appellant, but it is clear that there were not a dozen officers present as appellant Hines alleges. Officer Wilson stated that there were six or seven uniformed officers in the entire office but that no plainclothes officers were present when he arrived (H.Tr. 61). The witnesses indicated that two or three uniformed men were present besides three or four detectives (H.Tr. 210, 239, 273).

observe, they were able to describe appellant's appearance and actions in detail (H.Tr. 192-99, 232, 265-68).

As this Court has recognized, a one-man showup, while suggestive, is not *per se* violative of due process. *Wise v. United States*, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967), *cert. denied*, 390 U.S. 964 (1968).

There is no prohibition against a viewing of a suspect alone in what is called a "one-man showup" when this occurs near the time of the alleged criminal act; such a course does not tend to bring about misidentification but rather tends under some circumstances to insure accuracy. *Bates v. United States*, *supra*, 132 U.S. App. D.C. at 38, 405 F.2d at 1106 (footnote omitted).

In the case at bar, not only did the need for an accurate, immediate identification, inculpatory or exculpatory, make that confrontation necessary,⁸ but the spontaneity of that identification shows that it was not unduly suggestive. *Compare Jackson v. United States*, — U.S. App. D.C. —, 412 F.2d 149 (1969).

B. The lineup was constitutionally fair.

Both appellants assert that the lineup held at 6:30 p.m. on the day of the robbery was illegal, not because of *Wade*

⁸ Detective Sergeant Reilly conducted another on-the-scene viewing after appellant had been implicated, in order to ascertain who could identify appellant and determine the quality of that identification (H.Tr. 65). We submit that that confrontation is within the purview of *Russell*, since it was a continuing investigation of the identifications occurring within minutes of the crime (H.Tr. 64). To have failed to conduct that showup would have allowed many questions as to the definitiveness of the identifications to go unanswered. Even if that viewing was error it does not now warrant reversal for none of the eyewitnesses testified as to it, and the second viewing, assuming the witnesses did view appellant twice (Mr. Walshe viewed appellant only once; see H.Tr. 240, 242), only supplemented the first viewing. Detective Sergeant Reilly testified as to that showup, but we assert that was clearly harmless under *Harrington v. California*, 395 U.S. 250 (1969), and *Long v. United States*, D.C. Cir. No. 22,218, decided December 18, 1969.

but on the basis of *Stovall*. Their main contention⁹ is that the discrepancies in appearance among the participants vitiated the value of a lineup, for as appellant Ware has concluded, "[a] neon arrow pointing straight at the defendant Ware would not have done the job any better!" (Appellant Ware's Br. at 40.) However, we note that Mr. Walshe must have failed to see that arrow for he failed to identify appellant Ware (Tr. 167-68). A picture was taken of that lineup and was made part of the record at both the hearing and trial. That picture is presently before this Court as part of the record on appeal, "thus providing a visual record for future reference by counsel and courts alike." *United States v. Hamilton*, D.C. Cir. No. 22,361, decided July 24, 1969, slip op. at 6.

Appellants urge this Court to invalidate the lineup because there were differences in age and size among the persons who took part in it. The lineup consisted of six individuals, including both appellants. Four of the participants were police officers, Officer Williams (late 20's to early 30's), Officer Wilson (same age), Officer Cheeks (25 to 29), and Officer Lucas (35 to 39) (H.Tr. 99-100). Both appellants were clean shaven, as was one of the other participants, and appellants were 19 and 20 years old. Although there is a difference in appearance, we submit that that factor goes to the weight to be given to the identifications and not its admissibility. For as the hearing court stated:

Wade and its companion cases do not place upon the police the impossible burden of eliminating all discrepancies in description among persons placed in a lineup. Indeed, while there were certain discrepan-

⁹ Appellant Hines also contends that it was error to place him in the lineup because he was identified by those same witnesses only hours before. However, this is a jury argument and not a constitutional question. It seems that if the Government fails to conduct a confirmative lineup, it is asserted as error, and now if we do conduct such a lineup we are also claimed to be in error. Cf. *United States v. Hamilton*, *supra*, slip op. at 4-5 n.11.

cies present in this lineup, the six Negro males presented to the witnesses, all clad in dark raincoats with open collar shirts, presented a reasonable and fair group of individuals from which the witnesses were forced to focus on facial as well as other physical features to be able to select the individuals involved in the robbery. Memorandum and Order at 21 (footnote omitted).

We submit that as both the hearing court and trial court stated, the lineup was constitutionally fair. *Compare Patton v. United States*, 131 U.S. App. D.C. 197, 403 F.2d 923 (1968), with *Foster v. California*, 394 U.S. 440 (1969).

C. The photographic viewings occurring after the lineup did not lead to irreparable mistaken identifications.

Appellants contend that the photographic viewings that occurred after the lineup but prior to the suppression hearing nine months later, besides being unduly suggestive in themselves, are another link in the chain of impermissible police procedures. The result they seek is the inadmissibility of all identifications. We would add to this litany of viewings the identification of appellant Hines at the preliminary hearing by Mr. Walshe (P.H. Tr. 32-33) and the observations of both appellants by all the eyewitnesses at the suppression hearing. However, we strongly reject the assertion that any of the police procedures were impermissibly suggestive.

Relying on *Simmons v. United States*, 390 U.S. 377 (1968), and its progeny, appellants assert that the witnesses could not constitutionally view the pictures as they did. We submit that the teachings of *Simmons* do not apply to the case at bar because, except for Mrs. Boggs as to appellant Ware, the witnesses did not view the photographs in order to narrow down a field of suspects but in order to refresh their recollection of a known face and name (Tr. 381-82). We acknowledge that *Simmons* probably does apply to Mrs. Boggs' identification of appel-

lant Ware, for her viewing of his picture is arguably her first identification of him. The suppression court relied upon *Simmons* in suppressing her in-court identification of appellant Ware (Memorandum and Order at 22-23). Even if those photographic viewings are subject to *Simmons*, we suggest that the viewings are still proper, because the prior identifications and the opportunities to observe indicate that the witnesses had the ability to identify appellants and, therefore a one-to-one showup in picture form was not highly suggestive. The witnesses still had to remember what part that man played in the crime. The prior identifications also reflect a basis independent of any asserted taint from the suggested unlawful viewing. See *Bryant v. United States*, — U.S. App. D.C. —, —, 417 F.2d 555, 557-58 (1969).

III. Whatever handwritten notes may have been taken at the scene of the crime were not Jencks statements since they were not substantially verbatim recordings.

(Tr. 175-76, 202, 285-86, 287-96, 360, 369, 420, 567-69, 624, 634-37)

Appellants examined each eyewitness as to whether they had been questioned by the police at the scene of the robbery and then at the close of the Government's case moved unsuccessfully to strike all eyewitness testimony¹⁰ for failure to produce any handwritten notes of those questionings under the Jencks Act, 18 U.S.C. § 3500 (Tr. 634-37). Appellants now assign as error the court's denial of their motion to strike. However, their assertion is based upon the premise that the requested notes were Jencks statements as defined by 18 U.S.C. § 3500(e), and if that premise is false, as we submit it is, appellants' claim of error must be rejected. We would at this point note that the testimony of Mr. Walshe can not be at

¹⁰ Appellant Hines qualified his request by seeking to exempt Mr. Gateau's misidentification testimony from the Jencks sanction (Tr. 634).

issue here, since Mr. Walshe testified that no one took notes of any thing he said (Tr. 175).

On cross-examination by appellants, Mrs. Ricketson testified that she remembered speaking to a uniformed police officer who did take notes of her answers to his questions (Tr. 360). She also stated that Detective Reilly conducted a more intensive interview (*id.*). While Mr. Gateau did not remember seeing anyone taking notes (Tr. 202), Mrs. Boggs recalled that she was questioned by Detective Reilly, who took notes on a piece of paper using a pencil (Tr. 285). The trial court conducted a *voir dire* examination of Detective Reilly at which the officer stated he did take notes of his questioning of the witnesses, but just "general" notes (Tr. 288). Detective Reilly also stated that he destroyed those notes after using them to prepare the various police department forms which were all tendered, along with the grand jury testimony, to appellants. (Tr. 209, 287-93). Officers Casem and Frye also stated that they had jotted down notations. Officer Casem, who prepared the PD-251, spoke to one witness and used notes of that conversation in preparing the form, but he was unable to locate those notes, having looked several months before trial (Tr. 420, 422). However, he did not copy down word for word what the witness said, nor did he ask the witness if what he wrote was correct (Tr. 431). Officer Frye stated that he obtained descriptions of the felons within minutes after the crime by asking several of the witnesses at once for a description (Tr. 567-69).

Under the Jencks Act the Government must, "on motion of the defendant . . . produce any statement . . . of the witness in [its] possession" after that witness has testified. 18 U.S.C. § 3500(b). If it "elects not to comply with an order of the court" to produce such a statement, the testimony of that witness will be stricken. 18 U.S.C. § 3500(d). Although this Court in *Lee v. United States*, 125 U.S. App. D.C. 127, 130, 368 F.2d 834, 837 (1966), stated that the "Jencks Act does not embody in terms any 'good faith' exception," other courts have found destruc-

tion of notes in the normal course of police business not to require invocation of the sanctions of the act because the act speaks of the Government *electing* not to comply when it has notes within its *possession*. *United States v. Covello*, 410 F.2d 536 (2d Cir. 1969); *United States v. Williams*, 384 F.2d 488 (2d Cir.), *cert. denied*, 385 U.S. 836 (1966). Unlike *Lee, supra* (deliberate narcotics delay in arrest and critical nature of reports), and *United States v. Lonardo*, 350 F.2d 523 (6th Cir. 1965) (stenographic notes destroyed on the "eve" of trial), this case does not present any compelling reason why the *Covello* case *supra*, should not be followed, especially since the notes were incorporated into the reports tendered to appellants." *Cf. Alexander v. United States*, 118 U.S. App. D.C. 406, 336 F.2d 910, *cert. denied*, 379 U.S. 935 (1964).

We submit, however, that this Court need not reach the above issue, for the handwritten notes are not Jencks statements of the identifying witnesses. In *Palermo v. United States*, 360 U.S. 343 (1959), the Court stated in commenting on the reasons for the Jencks Act:

[I]t was felt to be grossly unfair to allow the defense to use statements to impeach a witness which should not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations. 360 U.S. at 350.

Subsection (e) of that Act defines a "statement" as either a:

- (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
- (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

¹¹ Assuming *arguendo* that Officer Gasem's notes were Jencks materials, their non-production was excusable since they were incorporated into one report and came from one witness. See *Killian v. United States*, 368 U.S. 231 (1961).

In the case at bar the handwritten notes cannot be covered by (e) (1) because they were not adopted by the witness. *Compare Campbell v. United States*, 373 U.S. 487 (1963).

We submit that those notes are not statements under subsection (e) (2) because they are not substantial recordings. Detective Reilly testified that he just took general notes of what the witnesses said and to have allowed impeachment by such items would have been improper for it cannot be said they were the witness' own words. *Palermo v. United States*, *supra*, 360 U.S. at 352; see *Williams v. United States*, 119 U.S. App. D.C. 177, 179-80, 338 F.2d 286, 288-89 (1964) (list of criteria for statement under (e) (2)). Such general notes are not within the purview of "substantial" recordings specified by subsection (e) (2). *Compare United States v. Williams*, *supra*. To have allowed their use as impeachment would have only added a confusing collateral issue to an already hectic trial.¹²

IV. Appellants were afforded an eminently fair trial.

(Tr. 14-19, 30-35, 613, 878, 888-89, 904-05, 913-15)

Appellants contend in a plethora of arguments that they were denied a fair trial by various procedural and evidentiary rulings. Appellant Hines asserts that he was denied a speedy trial, that he was prejudicially joined with the other defendants, and that the trial court favored the prosecution by its evidentiary rulings and jury instructions. Appellant Ware assails his conviction on a concealed speedy trial tack, besides questioning the propriety of an

¹² Appellant Hines contends that the trial court erred in refusing to give his Jencks instruction (See Appellant Hines' Br. at addendum 3). We note that once the Jencks sanctions are found to apply, the act provides specific remedies. *United States v. Lonardo*, *supra*. Also, appellant's instruction is deficient, for it creates an inference where the facts do not warrant one. If it cannot be said "with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend," the inference is invalid. *Leary v. United States*, 395 U.S. 6, 36 (1969).

Allen-type charge. We emphatically reject those assertions both individually and totally.

A. *Speedy Trial.*

In *Hinton v. United States*, *supra*, slip op. at 6 (footnote omitted), this Court stated that a "delay of more than a year between arrest and trial raises a speedy trial claim of *prima facie* merit." In this case, appellants were arrested on December 18, 1967, and finally tried on a new indictment in June, 1969, a time period of seventeen and a half months. "[T]he question whether there has been denial of the right to a speedy trial depends upon the circumstances of the case, and requires consideration of the length of the delay; reasons for the delay; diligence of prosecutor, court and defense counsel; and reasonable possibility of prejudice from the delay." *Hedgepeth v. United States*, 125 U.S. App. D.C. 19, 21, 365 F.2d 952, 954 (1966). We would note that in this case appellants were not incarcerated except for a minimal period.

From the time of arraignment on the initial indictment on February 16, 1968, appellants' case proceeded at a normal pace until appellants moved for suppression of the government's evidence in March 1968. In May the case was sent to a judge for a hearing, and on July 5, 1968, after almost a month's delay due to a failure of appellant Ware to appear, the hearing on the motion was given a date certain in September, and in that month a hearing was held. The motion was granted as to Hines, and the Government noted an appeal from that ruling. Appellant Hines filed motions for severance and an immediate trial during the pendency of the Government's appeal. That motion was denied. The co-defendant Edward Hines was finally arraigned in March 1969, and the case proceeded to trial in June of that year, within two months after the remand from this Court in the Government's appeal, No. 22,694. We submit that the delay from the filing of the motions to suppress until the reconsidered order on remand in April 1969, was a "delay for the benefit of the defense," since it concerned a final

determination of their motions. *Blunt v. United States*, 131 U.S. App. D.C. 306, 404 F.2d 1283 (1968), *cert. denied*, 394 U.S. 909 (1969).

Although there may have been a delay, there is not a violation of the right to a speedy trial unless that delay resulted in a prejudice to the accused's case. We submit that appellant Hines has not shown any prejudice to his case. He alleges that the delay resulted in prejudice because the handwritten notes were destroyed and the Government's witnesses' memories had begun to fade (Appellant Hines' Br. at 51). We fail to see how those factors resulted in any prejudice to the accused's ability to defend himself. Furthermore, the destruction of the notes was not a product of the delay but occurred prior to the hearing which took place nine months after his arrest. If any prejudice resulted from this delay, it cast a shadow over the Government's case, not that of appellant Hines.

Appellant Ware alleges prejudice resulting from the Government's failure to inform him of the existence of an identifiable fingerprint. He also asserts that we misled him by denying the existence of such prints (P.H. 23-24) and in effect setting up a "trial by ambush." (Appellant Ware's Br. at 49). However, appellant was informed immediately upon the prosecution's discovery of the print (Tr. 20-22) and was given time to examine it (Tr. 38-39). In fact the following colloquy took place during the trial at the bench during the cross-examination of the fingerprint examiner, Mr. Dion:

MR. GREEN [the prosecutor]: . . . You haven't gotten your fingerprint man to take a look at this [latent print]?

MR. WILLIAMS [appellant Ware's counsel]: No, I explained it fully to him. I am satisfied with my examination of it. (Tr. 613).

This is not a case of the prosecution's deliberate or negligent suppression of evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), nor a situation where the prosecutor has intentionally misled appellant. Since appellant's counsel

knew of the existence of such evidence, albeit on the eve of trial, and since his attorney stated that he was satisfied with his examination, we fail to understand how he was prejudiced. The only prejudice could be that he might have pled guilty if he had known of its existence before hand.

B. Joinder.

Under FED. R. CRIM. P 8(b), two or more defendants may be joined in an indictment "if they are alleged to have participated in the same act or transaction" While it is the general rule that persons jointly indicted should be tried together, FED. R. CRIM. P. 14 allows a trial court to sever "[i]f it appears that a defendant . . . is prejudiced by a joinder . . . of defendants in an indictment" Such a motion for severance is addressed to the discretion of the trial court and will not be reversed unless a clear abuse of that discretion is shown. *Brown v. United States*, 126 U.S. App. D.C. 134, 375 F.2d 310 (1966), *cert. denied*, 388 U.S. 915 (1967). Appellant Hines in the case at bar did make a motion to sever, alleging prejudice due to joinder with his brother, strong evidence against appellant Ware who was caught at appellant Hines' house, and finally a fear that another defendant would comment on his failure to testify (Tr. 30-33). The trial judge then instructed counsel not to comment on a decision by any defendant not to testify (Tr. 33-34), and denied appellant's motion. (Tr. 35).¹³

In this case there was not a *Bruton*¹⁴ problem, nor was there a combination of inconsistent defenses. Appellant

¹³ During appellant Ware's closing argument his counsel did state "if we were innocent, we would take the stand to try to exonerate ourselves" (Tr. 878.) The trial court characterized that comment as "perfectly natural and there was no concentration on anybody but Theodore Ware." (Tr. 889.) *Cf. Glasser v. United States*, 315 U.S. 60, 83 (1942). Appellant Hines' counsel, while noting his objection, stated, "I don't think I could ask for a mistrial," And he added, in response to the judge's inquiry, that he did not want a corrective instruction, for the less said the better. (Tr. 889).

¹⁴ *Bruton v. United States*, 391 U.S. 123 (1968).

alleged only a fear of guilt by association. We would submit, however, that whenever two people act together in committing an offense they stand the chance of being tried together. *Barnes v. United States*, 127 U.S. App. D.C. 95, 381 F.2d 263 (1967). Although the case against Appellant Ware contained a fingerprint identification, the evidence connecting appellant Hines with the crime was equally as strong, if not stronger, since he was arrested fleeing from the scene. We would note that the jury was clearly able to follow the court's instructions against guilt by association (Tr. 904-05), since after less than a day's deliberation they acquitted the one defendant who had the most to fear from such association.

C. The trial court's rulings and instructions.

A federal trial judge has a broad discretion in conducting a trial to assure the orderly, expeditious, and correct progress of a trial. However, as with all areas of discretion, that prerogative must not be abused. *Bitter v. United States*, 389 U.S. 15 (1967). Appellant Hines contends that the trial court did abuse its discretion in this case, citing as examples the court's reminders to limit cross-examination, time limits on closing arguments, and evidentiary rulings in favor of the government. We submit that a reading of the entire record shows that appellant's argument is without merit. The trial judge in this case should be praised not chastised, for his patience in dealing with appellants' counsel. Appellant Hines attempted to elicit hearsay evidence, not to establish the authorship of the radio message he cites (Appellant Hines' Br. at 53) (*Compare* Tr. 454-55 with 578-587). The trial court sought to control a trial of a simple robbery that had mushroomed into a 1300-page transcript. To have allowed appellants' counsel to proceed in whatever fashion they wished would have prejudicially clouded a case already confused by unimpeaching impeachment.

In answer to appellant Hines' assertion that the trial court erred in its instructions on identification, we simply

ask this Court to read that charge (Tr. 913-15), specifically the statement that "You may consider, however, the circumstances in which the witnesses viewed the suspects to determine whether the circumstances were, in fact, suggestive to the witnesses" (Tr. 913-14.) *United States v. McNeil*, D.C. Cir. No. 22,360, decided October 13, 1969, slip op. at 2 n.2, answers appellant Ware's *Allen* charge claim. We would note that the trial judge in *McNeil* was also the trial judge in the case at bar.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed as to both appellants.

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United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 13 1971

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

Nathan J. Paulson
CLERK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

NO. 23,281

UNITED STATES OF AMERICA
v.
WILLIAM A. HINES, Appellant

NO. 23,391

UNITED STATES OF AMERICA
v.
THEODORE M. WARE, Appellant

Appeals from the United States District Court
for the District of Columbia

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December 3, 1971



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APPELLANT WILLIAM A. HINES'
PETITION FOR REHEARING
AND
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INTRODUCTION

This case presents several issues of compelling importance. The Panel's lengthy opinion decided eight distinct issues pertaining to appellant Hines. Two issues, as to which the Panel disagreed, are of such compelling importance that they should be decided by the entire Court. They relate to the Jencks Act and severance. Three other issues should be reconsidered, at least by the Panel, be-

cause of extremely important misunderstandings of the record which are evident from the Panel's factual discussion, and because of a failure by the Panel to grasp the inter-relationships of the issues. In fact, at least four of the issues discussed herein relate to the basic question of how far the police may go in the name of convenience and efficiency before a court will say "enough."

The net effect of the Panel's decision is to approve singly, and in combination, each of the following actions and circumstances which may arise in a case where the Government's only evidence is eye-witness testimony, but in this case where they all occurred:

1. The Panel approved the arrest of a nineteen year old youth running away from the scene of a robbery (and the sounds of intense police activity) on the basis of his running, looking over his shoulder, getting into a police car which dramatically stopped him, and saying that he got into the car because he was "tried of running;" but where he was found to have no weapons or fruits of a robbery, he was dressed distinctively in a hat and overcoat in sharp contrast to the look-out description (two men, both bare headed, one in a blue suit and one in a black raincoat), and where the arresting officer believed that he did not then have probable cause for an arrest, but took him to the scene of the robbery for possible identification and then to arrest him.

2. The Panel also approved the police judgment to take appellant to the scene (a procedure inherently fraught with peril to a suspect's right to due process and presence of counsel and which, even when solidly justified, raises threshold constitutional questions) where the issue of justification merely for the arrest was at least a close question, and where the justification for the perilously suggestive identification procedures was based solely on

considerations of police convenience (in this case retroactively to validate a questionable arrest).

3. The Panel approved the identification procedures at the scene, although there was an extraordinary number of police officers present, the victim-witnesses were agitated and in the presence of one another during the procedures, appellant was in handcuffs, he was displayed twice, and where genuine factual questions existed as to how many witnesses then claimed to be able to make an identification and who they were or whether any of them affirmatively stated that Mr. Hines was not involved in the robbery, and whether the claimed identifications were spontaneous, or followed upon discussions concerning his hat and a request that he speak.

4. The Panel also found that the identification procedures were, as a matter of fact, not suggestive in terms of due process requirements and in the absence of counsel; however, the Panel did not consider the crucial and explicit factual finding by the district judge who presided at the suppression hearing who found that "a lengthy discussion of the due process question is unnecessary" (Slip Op. p. 10) because he was basing his decision on the absence of counsel, but who, nevertheless, did make a factual finding that the

"showup identification in this case was so overwhelmingly suggestive as to taint any subsequent identification of this defendant. " (Slip. Op. p. 17).

In a footnote the judge's factual findings continued with the observation that

"It would require the presence of some exceptional circumstances, such as prior knowledge of the defendant by the witnesses before the offense, or the continued presence of the defendant at the scene for a significantly longer period of time than the usual

fast moving and quickly completed robbery, to enable the Government to prove the dissipation of a taint as great as the one involved here (Slip Op. p. 17, Fn. 22).

Although the suppression hearing judge later reversed his decision to suppress all identification testimony because counsel was not present during the show-up, he never went back to his factual findings of "overwhelming suggestivity," although he was strongly urged to return to those findings when this Court's intervening decision in Russell v. United States, 133 U. S. App. D. C. 77, 408 F. 2d 1280, cert. den., 395 U. S. 928 (1969) prompted him to reverse his prior decision based on absence of counsel during the show-up. These factual findings cannot be lightly distinguished by this Court, yet they were not even discussed in the Panel's opinion concerning the denial of due process by the highly suggestive show-up identification procedures which occurred in this case.

4. The Panel resolved in the Government's favor the issues raised by the destruction of all police notes containing (a) descriptive words and phrases used by the victims in describing the robbers before appellant Hines was brought to them for two viewings, and (b) notations as to whether one of Government's trial witnesses (Mrs. Boggs) who claimed she identified Mr. Hines at the scene actually did so. The Panel's majority refused to reach the issues raised by the destruction of these police notes, despite their crucial bearing on what happened at the scene when Mr. Hines was taken there without the presence of counsel, upon a "finding" by the Panel that the notes did not contain "substantially verbatim" what the witnesses had said, but where the Panel did not have the notes to see how verbatim they actually were. The only police notes not destroyed were those of the arresting officer (Gov't. H. Exh. 14), and those notes are extremely detailed and

probably meet the criteria of subsection (e) (1) of the Jencks Act, thus raising the additional question, not discussed by the Panel, of whether the notes of Officers Reilly, Frye, Lanigan, McFarland and Casem, all Government trial witnesses, were independently required to be produced on this ground, independently of whether they met the test of containing substantially verbatim statements by the victim-witnesses. Because the Panel's opinion "found" that the handwritten police notes did not contain substantially verbatim transcriptions of the witnesses statements, the Panel did not reach the question of whether the destruction by the police of their notes was justified, whether the notes were incorporated into typewritten police reports as claimed by Officer Reilly even though there is no question that they were not so incorporated ^{1/} where specific defense requests to cross-examine on the basis of sharp conflicts in the typewritten reports were forbidden by the trial court for the reason that the conflicting statements in the reports were not attributed to specific witnesses, and where the trial court denied a defense request for a hearing to determine the reasons for destruction of police notes, the extent of their incorporation into the typewritten reports, and to determine which witnesses contributed each conflicting item in the reports.

^{1/} Not one iota, not even a word or a phrase, of descriptive detail given before Mr. Hines was brought to the scene was incorporated into the typewritten reports with attribution to a specific witness by name. Moreover, although Mrs. Boggs was interviewed by Officer Reilly with notes taken by him, none of the police reports stated whether she identified Mr. Hines when he was brought to the scene. Also, Police Form 163 provides a space for the "statement" of each witness, and in this case every space on this Police Form was left blank (Gov't. H. Exh. 13), despite the uncontested fact that Officer Reilly obtained "statements" from each witness presented at trial for the purpose of giving identification testimony. Officer Wilson's notes and P. D. Form 163 are reproduced in the Appendix hereto.

5. The Panel affirmed the trial court's denial of the pre-trial motion by defendant Hines for a separate trial which was based on the likelihood that he would not testify and that this fact might be commented upon by counsel for other parties; that the Government had damning fingerprint evidence against co-defendant Ware who was arrested at Mr. Hines' home shortly after the robbery; and that these elements, in combination, would be so prejudicial as to deny Mr. Hines a fair trial. All of these anticipated fears come to pass. On closing argument counsel for defendant Ware drew the jury's attention to the fact that Mr. Ware had testified on his own behalf "as you and I, if we were innocent, we would take the stand to try to exonerate ourselves . . ." (T. Tr. 878), which comment was followed shortly thereafter by a companion comment by Government counsel: "There's been some other talk about would a man who's guilty do this; would a man who's guilty do that . . ." (T. Tr. 894), and that Mr. Ware was an associate of Mr. Hines and arrested at the Hines home (T. Tr. 895). ^{2 /}

Despite this combination of error upon error, each compounding the other, together with the questionably thin justification for the police procedure of taking suspects to the scene of a crime for identification purposes, the Panel's opinion contains several mistaken statements of fact which are important. For example, contrary to the statement appearing twice in the Panel's opinion, (Slip. Op. pp. 5 and 15) appellant Hines had not had "many" previous encounters with Detective

^{2 /} The relevant portions of closing arguments are reproduced in the Appendix attached hereto.

Lanigan on other criminal matters. It was appellant Hine's brother, Eddie, with whom Detective Lanigan had prior contact concerning criminal matters (H. Tr. 188-189). Appellant Hines had no prior criminal record.

The Panel's opinion also found that Mr. Hines was identified "immediately and simultaneously" by four witnesses at the scene of the robbery. It is not a fact that the identifications occurred "immediately and simultaneously," and it is not a fact that four of the victims identified him there. The fact is that there was uncertainty on the part of the witnesses, they conversed among themselves and with the police officers, they requested to have Mr. Hines speak the words spoken by the look-out man at the conclusion of the robbery, and they were concerned about the hat Mr. Hines was wearing, asking that it be removed. ^{3/}

At the suppression hearing Mr. Hines testified about the uncertainty of the identifying witnesses at that time (H. Tr. 16-19), and this testimony was partially corroborated by the Government's own witnesses: (a) Officer Wilson, the policeman who brought Mr. Hines to the scene of the crime (and whose testimony has been relied upon for the finding that the identifications were "immediate and simultaneous") testified at the suppression hearing that "I just didn't observe too much at that point," and that he could not remember if one of the police officers had removed Mr. Hines' hat or whether Mr. Hines was asked to straighten up (H. Tr. 62-63); and (b) Mrs. Ricketson was also questioned about whether Mr. Hines' hat was removed by an officer so that she could look at his bare head, and whether the victims may have told the police officer that the third person involved in the

^{3/} Recall that the first radio look-out description, broadcast before Mr. Hines was taken to the scene, stated that there were two men involved in the robbery, both bare headed, one wearing a blue suit and one wearing a black raincoat.

robbery had entered the store and shouted "here come the police" or something to that effect, and her answer was "it could have happened" (H. Tr. 212). At trial, when questioned about the confrontation at the scene, she expressly admitted that Mr. Hines "was asked to say something, yes." (T. Tr. 379).

Another crucial finding in the Panel's opinion was that Mrs. Boggs had identified Mr. Hines at the scene of the crime. This is incorrect. The Panel's finding of "ample evidence" to support this finding apparently was based upon what the judge presiding over the suppression hearing had determined. The judge who presided at the suppression hearing did not "find" that Mrs. Boggs identified Mr. Hines at the scene. He merely and only reiterated the testimony by Officer Wilson that four victims identified appellant Hines, and that Mrs. Boggs claimed in her testimony that she identified him at the showup. (Opinion by Judge Youngdahl, p. 5, Fn. 6). In fact, the only "finding" made by Judge Youngdahl with regard to Mrs. Boggs was that any in-court identification by her of co-defendant Ware would be barred because she had viewed photographs of Mr. Hines and Mr. Ware prior to giving testimony before the grand jury, and it was at that time that she first claimed an ability to give identification testimony as to Mr. Ware. The fact is that prior to her viewing the colored poloroid pictures of the defendants individually, and the black and white line-up photographs, other persons, including the police, did not know of her claimed ability to identify anyone. Detective Reilly, in charge of the investigation, interviewed all of the victim-witnesses on the day of the robbery, including Mrs. Boggs, and he helped arrange the line-up. He had not been informed by her that she could identify anyone, and she was not brought to police headquarters for the line-up procedure on the evening of the robbery. (H. Tr. 106, 117-19, 134-37). Mrs. Ricketson,

a co-worker of Mrs. Boggs, also testified that she was unaware that Mrs. Boggs' identified Mr. Hines on the day of the crime. (H. Tr. 215-217). Mrs. Ricketson, Mrs. Boggs and Mr. Gateau all testified that on the day after the robbery a newspaper photograph of Mr. Hines and Officer Wilson was discussed by the three women employees of the realty company, a discussion generated in part by confusion among them over the names and faces of the two robbers who were inside the office (H. Tr. 215-17, 274-275, 282-83, 296-97), and that the three ladies did not "have it straight as to who was which man." (H. Tr. 275). Thus, the only evidence (deemed by the court to be "ample") that Mrs. Boggs identified Mr. Hines on the day of the crime (in the highly suggestive and confused atmosphere of the scene of the crime) was Mrs. Boggs' claim, and Officer Wilson's testimony that "four" victims identified Mr. Hines when he was brought to the scene -- although Officer Wilson later admitted that he did not observe too much at that time. Judge Youngdahl, who presided at the suppression hearing, did not make any finding as to whether Mrs. Boggs, did in fact, identify Mr. Hines on the day of the crime, and he did not discuss or evaluate the conflicting testimony on this issue. There are, however, other uncontradicted facts which point even further to the failure or inability of Mrs. Boggs to identify Mr. Hines on the day of the crime. First, the Government's entire case against the third defendant, Mr. Edward Hines, was the testimony of Mrs. Boggs. While testifying at the suppression hearing she pointed him out while sitting in the court room as being the third person involved in the robbery. He was thereafter indicted. Mr. Edward Hines was found not guilty by the jury on the basis of conclusive and uncontradicted testimony that he was in Philadelphia on the day of the crime. This, alone, severely undercuts Mrs. Boggs' claims as an identifica-

tion witness in this case, as do her biased statements as a witness. She referred to one of the defendants as a "nigger" (H. Tr. 265), and in describing the hat worn by one of the robbers, she said "well it was a small hat with a brim, dark, like most of them wear." (H. Tr. 266, emphasis added). Her proclivity to exaggeration in her claims as a witness is also shown by her insistence that it took the look-out man "forty-five seconds or a minute" (T. Tr. 236) to run through the real estate office when the police arrived; whereas other Government witnesses swore that the look-out man ran through the office in about five seconds. As mentioned above, the only Government evidence against co-defendant Edward Hines was Mrs. Boggs' identification testimony, and that was predicated upon her having a sufficient opportunity to view the look-out man. Her insistence that a sufficient opportunity was provided to view the look-out man because it took him "forty-five seconds or a minute" to run through the office is not only a commentary on how robbery victims can grossly overstate the elapsed time of a robbery, but it is also a vivid illustration of how an identification witness can embroider testimony to make it more persuasive to the jury. Finally, it should be noted that in her testimony, she stated that this was her "third hold-up" (H. Tr. 270). We submit that it was a fundamental error to permit Mrs. Boggs to give identification testimony against appellant Hines at his trial, and that this error has constitutional proportions. It was a violation of appellant Hines' right to due process of law at the scene of the crime, and her testimony was prompted by the highly suggestive display of photographs to her prior to her Grand Jury testimony (without counsel being present) -- at which time she informed the Government attorney that she could give identification testimony. Such a constitutional error requires a reversal, without more. Fahy v.

Connecticut, 375 U. S. 85 (1963), and Chapman v. California, 386 U. S. 18 (1967).

An additional factual error or misunderstanding demonstrated in the Panel's opinion, are the repeated references to Mr. Gateau as an identification witness against Mr. Hines. The fact is that although Mr. Gateau was allegedly one of the persons who identified Mr. Hines at the scene of the crime, he failed miserably as an identification witness both at the preliminary hearing and at trial; on both occasions he selected defendant Ware when asked to identify the person who was brought to the scene of the crime shortly after the robbery. Accordingly, he was useless as an identification witness. It should also be recalled that while the Government had fingerprint evidence implicating defendant Ware in this robbery, the only evidence presented against Mr. Hines was identification testimony by Mr. Walshe (who spent the entire robbery lying face down on the floor, who was elderly, and who wore glasses), Mrs. Ricketson (who spent the entire robbery with the person identified at trial as defendant Ware), and Mrs. Boggs (whose late maturing ability to identify anyone is not supported by the record).

The foregoing discussion, while necessarily lengthy because of the multitude of facts and circumstances involved in this case, raises two issues which should be decided by this entire court, and at least three other issues which should be reconsidered, at least by the Panel. The issues most deserving of scrutiny by the entire court will be presented first, followed by the issues which should be reexamined by either the full court or by the Panel.

I. THE JENCKS ACT QUESTION

A divided panel affirmed the conviction of appellant Hines, and in affirming, it decided an extremely important issue which will have a crucial and substantial impact on the system of criminal justice in the District of Columbia. If the purpose of that system is to insure that the truth is discovered, then the efficacy of that system has been seriously impaired if the Panel's decision is left standing. Over a strong and persuasive dissent, the panel concluded that verbal descriptions given by victims to police immediately after a robbery, and written down by the police on their note pads exactly as given by the victims, were not substantially verbatim recitals of oral statements made by the witnesses within the meaning of the Jencks Act, 18 U.S.C. § 3500(e)(2). We submit that this conclusion was based on fundamental misunderstandings of the record, and a failure by the Panel to grasp the significance of how the destruction of these police notes completely frustrated the search for truth at appellant's trial. We submit that it was error for the trial court to refuse the defense request for a hearing specifically to determine the circumstances of the creation of the notes, what they contained, their destruction, why they were not fully incorporated into the typewritten police reports, and why such portions of them as were incorporated were not attributed to specific witnesses by name. The trial court also erred in refusing to permit cross-examination of witnesses with the typewritten police reports on the erroneous basis that the reports did not indicate which conflicting statements were given by which witness. Finally, the trial court

committed error in refusing to permit defense cross-examination of the identification witnesses by use of the police radio broadcast description which clearly did not match appellant Hines on the day of the crime. This combination of error, beginning with the refusal to grant a hearing and ending with extremely unreasonable restraint on cross-examination, resulted in a complete frustration of the defense in attempting to prove its theory of the case. That theory was that the two persons who committed the robbery inside the real estate office were bareheaded, one was dressed in a blue suit and one was dressed in a black raincoat. The third person, the lookout man, was dressed in a hat and coat, and when Mr. Hines was brought to the scene dressed in a wool hat, topcoat and handcuffs, and under the highly suggestive and strained atmosphere ten minutes after the robbery, he was identified by some of the victim-witnesses, during or after discussions concerning his hat and the words spoken by the lookout man. One of the police reports prepared on the day of the robbery (Govt. H. Exh. 17) actually described Mr. Hines as the lookout man ("#3 subject"), although the defense was precluded from using his report to cross-examine the witnesses. Another police report prepared on the day of the events, apparently from police notes (Police Dept. Form 251, Hines T. Exh. 3) contained a description of the lookout man (19-year old Negro male, 5 feet 8 inches tall and wearing dark clothing), quite similar to the appearance of Mr. Hines when he was presented at the scene of the robbery for possible identification. Another police report (Govt. H. Exh. 18), apparently prepared from notes taken during conversations with

witnesses, indicated that Mr. Hines was the robber who left the .32 caliber pistol at the scene -- even though the Government's theory at trial was that the lookout man left this weapon in a chair. Because the only recorded descriptive information given by the victims prior to Mr. Hines' arrival at the scene with Officer Wilson was the radio broadcast describing two men, one in a blue coat, one in a black raincoat, and neither wearing a hat, it was crucial to the defense to determine whether those were the two men inside the store during the robbery, thereby conclusively demonstrating that Mr. Hines was not inside the office as claimed. The destruction of the police notes, the incomplete and sloppy incorporation of those notes into the police reports, and the trial court rulings denying a hearing and cross-examination using either the reports or the police broadcasts, all combined to deny appellant Hines a fair trial, even disregarding the gross series of unfair factors and circumstances which characterized the arrest, confrontation at the scene of the crime, photographic identifications, etc. We submit that this identification case presents a much more compelling requirement for a reversal than has ever been presented to this court, because the combination of police actions and inactions have frustrated the search for truth.

In his brief and argument before the Panel, appellant Hines expressly cited and relied upon the 1966 decision by a panel of this Court in Lee v. United States, App. D. C. , 368 F.2d 834, where Judge McGowan (who wrote the Panel's majority opinion in this case) put the Police Department on clear and certain notice that the destruction of

notes cannot be excused even if done in good faith. The Lee decision required a reversal where the statements of witnesses were not produced or otherwise made available, such as through typewritten police reports, and upon a showing that the ability of the accused to defend had been jeopardized. In this case the statements were not incorporated into the police reports, and the ability of the accused to defend was not only jeopardized, it was entirely frustrated. The failure of the Panel to even discuss the Lee decision, or to distinguish its clear mandate to the Police Department, is surprising and confusing. And so is the failure of the Panel's opinion to cite or discuss the June 16, 1971 decision by a panel of this court in United States v. Broadus (No. 23,951), wherein convictions were reversed because at trial the defense was not permitted to cross-examine Government witnesses using a joint statement by two witnesses, on the grounds that the particular impeaching statement could not be attributed to a specific witness. This court specifically held in Broadus that inconsistencies between trial testimony of one witness and a joint summary of that witness' statement together with a statement of another, was a legitimate and necessary basis for cross-examination because of its impeaching character. The court stated (Slip Opinion No. p. 9):

"The prosecution, of course, could endeavor to show at trial that there was nothing in the summary which could be attributed to the witness Gutierrez alone. Entirely to discard the summary, however, merely because it was joint is not a sufficient basis for excluding this valuable evidence."

The court went on to conclude that the "uncertainty and confusion due to the inconsistencies * * *, if known to the jury could well have created a reasonable doubt as to whether appellant robbed Gutierrez. We think the summaries were essential to a full and fair disclosure to the jury of the available evidence bearing upon the charges against appellant." (Slip Opinion p. 9)

In the Appendix attached hereto are excerpts from the trial transcript showing the series of trial court's rulings denying a hearing contrary to Campbell v. United States, 365 U.S. 85 (1901), and forbidding use of police reports and radio broadcast descriptions for impeachment purposes contrary to Broadus, supra. The cumulative impact of these incorrect rulings is obvious.

Still another aspect of the trial court's erroneous rulings concerning the Jencks Act materials in this case, and the Panel's failure to discuss or distinguish the Lee decision, is that in Lee, the Court found that the ability of the accused to defend might have "already been jeopardized by a deliberate delay between offense and arrest calculated to serve police purposes only." 368 F.2d at 837. In the instant case, the identification procedures at the scene of the crime were calculated solely to serve police purposes and, we submit, the ability of the accused to defend has been considerably jeopardized, if not entirely frustrated, by the absence of counsel during that showup, by the destruction of all police notes which would indicate precisely what happened there, and the destruction of police notes which would indicate whether any of these witnesses were giving descriptions of the robbers which would have

excluded appellant Hines.

We also submit that the dissenting opinion herein should be adopted by this Court as a test to be applied in determining whether descriptive information given to a police officer and written down by him verbatim can constitute "substantially verbatim" statements under subsection (e)(2) of the Jencks Act. A witness' statement does not have to be lengthy to be "substantially verbatim." It can be substantially verbatim if it contains only five words (such as "bareheaded, blue suit, black raincoat"). The majority opinion's reliance on United States v. Augenblick, 393 U.S. 348 (1969), is misplaced. The trial judge's finding in Augenblick, that the notes there in issue did not contain substantially verbatim statements from the witnesses, does not compare with what happened in this case, where the trial judge refused to conduct a hearing in order to make such a determination, a hearing required by Campbell v. United States, supra, which decision also established the requirement that upon such a hearing the Government has the burden of showing that its loss or destruction of such statements was reasonable and in good faith. In this case, no such hearing was held, and no such showing was made. In fact, it requires no imagination whatsoever to indulge in an assumption that the statements obtained in this case from the eye witnesses were so conflicting that the police officers preparing the typewritten reports did not include specific statements from the witnesses with attribution to specific witnesses by name because the statements were a morass of conflicting information. The typewritten reports themselves contained more than a

sufficient amount of conflicting information to raise this question. Only if this Court is to assume that police officers always remember everything that was said and done during an investigation (and in this case, the trial was a year and a half after the robbery occurred), and only if this Court is to assume that police officers never shade their testimony or refrain from volunteering information which might be hurtful to the Government's case, can the fictions indulged by the trial court and approved by the panel of this court pass muster. The question is, however, whether the federal system of criminal justice should operate upon such fictions. We submit that they cannot, and that there is no substitute for a hearing as to reasonableness, good faith, complete incorporation, etc., especially in a case where the ability of the accused to defend has been seriously jeopardized, if not entirely frustrated, by the combination of circumstances such as found here.

There is also the question raised earlier, as to whether the police notes constituted Jencks Act statements under subsection (e)(1). Several police officers were Government witnesses at this trial, many of whom admitted that they made notes while performing their duties following this robbery. The handwritten notes of Officer Wilson which are in evidence (and which are included in the Appendix hereto) show that they were so detailed and complete as to qualify as an (e)(1) statement, and therefore producible under the Jencks Act. If assumptions are to be indulged concerning the notes of the other officers, Officer Wilson's notes require the assumption that the other notes were not sketchy or general,

that they qualified as (e)(2) statements as to the eye witnesses, and that they qualified as (e)(1) statements as to the police witnesses at trial.

Finally, there is the recent decision by a panel of this Court in United States v. Bryant, U.S. App. D.C. , 439 F.2d 642 (January 29, 1971), wherein, under circumstances strikingly similar to this case, a remand was ordered for a determination of the degree of negligence or bad faith involved, the importance of the evidence lost. The Bryant decision (1) indicates the remedy required herein (although we submit that the importance of the destroyed notes is conclusively shown on this record without need of a remand), and (2) there must be a trial court hearing when such issues are raised. Bryant requires a reversal here.

II. THE SEVERANCE ISSUE

In his concurring opinion in Krulewitch v. United States, 336 U. S. 440 at 454 (1949), Mr. Justice Jackson discussed the problem facing multiple defendants:

"There generally will be evidence of wrong doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent he is taken to admit it"

As shown above, although the only real Government evidence against appellant Hines was eye-witness testimony by two of the five victims of this robbery, the combination of comment by counsel for the co-defendant and by Government counsel, impressed upon the jury the failure of appellant Hines to testify, and impressed upon the jury the fact that co-defendant Ware, as to whom the Government had fingerprint evidence, was an associate of Mr. Hines and was arrested at the Hines home shortly after the robbery. These highly prejudicial factors were, in fact, anticipated by Mr. Hines' defense counsel, who moved before the trial for a severance specifically citing DeLuna v. United States, 308 F. 2d 140 (5th Cir., 1962). The trial judge denied the motion for a severance, admonishing other counsel not to refer to the fact that Mr. Hines did not testify. Of course, the admonition was violated, and appellant Hines was convicted. His conviction should be reversed for the reasons stated by Chief Judge Bazelon, in his separate opinion (Slip Op. pp. 34-36).

As stated by the Court in United States v. Kahn, 381 F. 2d 824, 839 (7th Cir.), cert. den. 389 U. S. 1015 (1967), the determination to be made is:

"Whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant."

In Kahn, the trial court gave complete admonitory instructions and the Court of Appeals therefore found that there must be a strong showing of prejudice to warrant a reversal. That strong showing of prejudice is made in this case, and appellant Hines' conviction should be reversed and remanded for a new trial separate from any other defendant.

This Court's attention is respectfully directed to a recent decision by a Panel of this Court in United States v. Gambrill, (No. 23,512; July 29, 1971) where the case was remanded with an order that separate trials be held. As in this case, a Government eye-witness should not have been permitted to give identification testimony (as is the case with Mrs. Boggs herein), and the opinion in Gambrill noted that since a new trial was required without the testimony of one of the eye-witnesses, the ends of justice required a severance upon new trial.

III. APPELLANT HINES SHOULD NOT HAVE BEEN TAKEN TO THE SCENE OF THE CRIME

The Panel's opinion (pp. 17-21) rejected the contention that Mr. Hines should not have been taken to the scene and the contention that due process failed him at the scene because of the several factors noted above. Our contention is simple. Probable cause for arrest in a close case is not, by itself, sufficient to justify taking a suspect to the scene of a crime. This Court must so rule to refute the dangerous suggestion that the elements of justification for arrest are conterminous with the elements of justification for taking a suspect to the scene of the crime for identification purposes. These two questions are not the same, and despite a growing number of opinions by this Court which have resulted in a convergence of these two separate questions, we respectfully submit that the

Supreme Court decisions in United States v. Wade, 388 U. S. 288 (1967), and Stovall v. Denno, 388 U. S. 293 (1967) have been traversed by the Panel's opinion in this case.

Beginning with Russell v. United States, supra, this Court has decided several different cases involving prompt, on-the-scene identification procedures, and approved many of them; however, none of those cases involved the number of arbitrary and suggestive elements present in this case, and none of them involved a specific and distinct finding by a trial judge presiding over a suppression hearing, as was found in this case, that the "showup identification in this case was so overwhelmingly suggestive as to taint any subsequent identification of this defendant." (Opinion of Judge Youngdahl, p. 17).

Several opinions by this Court filed since the completion of the brief on behalf of appellant Hines (December 29, 1969) appear to be directly relevant here, but they were not mentioned in the Panel's opinion: United States v. Perry, (No. 22,469; June 1, 1971) reaffirmed the crucial importance of "the caliber of the description of the perpetrator" furnished to the police (Slip Op. p. 11, Fn. 35). In Campbell v. United States, U. S. App. D. C. , 429 F. 2d 209 (June 23, 1970), the question of suggestivity was remanded for specific findings; and in United States v. (John) Wilson, U. S. App. D. C. , 435 F. 2d 403 (May 20, 1970), the court was troubled by the fact that "two victims were together when they identified appellant as the assailant." In the instant case, of course, all of the victims were together when Mr. Hines was brought to the scene -- a factor not discussed in the Panel's opinion. See also, generally, United States v. (Henry) Johnson, (No. 23,375, October 20, 1971) for relevant discussions of overly suggestive identification procedures and relevant factors to be considered in

evaluating identification testimony, prominently and specifically listing the existence of "any discrepancy" between descriptions given prior to viewing suspects and their actual appearance. (Slip Op. p. 12).

IV. MRS. BOGGS SHOULD NOT HAVE BEEN
PERMITTED TO GIVE IDENTIFICATION
TESTIMONY

As demonstrated above, The Panel misapprehended the record in finding that Mrs. Boggs had identified Mr. Hines on the day of the crime. The weight of the evidence clearly raises at least a genuine issue as to whether she identified Mr. Hines at the scene of the crime, and the other aspects of her competency as an identification witness so undercut the standing claimed for her by the Government, that she should not have been permitted to testify at trial. As in Gambrill, supra, her testimony requires a reversal and a new trial.

CONCLUSION

WHEREFORE, appellant William A. Hines respectfully requests this Court, en banc, to consider the substantial questions presented concerning the administration of criminal justice in the District of Columbia. Alternatively, the Panel which previously considered this case is respectfully requested to reconsider its opinion, to rehear the case, and to reverse the conviction of appellant William A. Hines.

Respectfully submitted,



MICHAEL VALDER

Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W. #800
Washington, D. C. 20006
Court-appointed attorney for
Appellant William A. Hines

CERTIFICATE OF SERVICE

I, Michael Valder, do hereby certify that I have this 3rd day of December, 1971, served a copy of the foregoing upon John A. Terry, Esquire, United States Attorneys Office, United States Court House, Washington, D. C. and upon William A. Jackson, Esquire, 5110 River Hill Road, Washington, D. C. 20016, Counsel for Appellant Theodore M. Ware, by mailing him two copies, first class United States postage prepaid.

A handwritten signature in cursive script that reads "Michael Valder". The signature is written in dark ink and is positioned above a horizontal line.

Michael Valder

APPENDIX TO APPELLANT
WILLIAM A. HINES' PETITION
FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

1. Officer Wilson's Handwritten Notes (6 pages).
2. Police Form 163 (2 pages).
3. Excerpts from Trial Transcript.
 - (a) Defense cross-examination of Mr. Gateau regarding Jencks Act materials (T. Tr. 202-207).
 - (b) Defense cross-examination of Mrs. Boggs regarding Jencks Act materials (T. Tr. 283-286) and Bench Conference, and ruling denying defense request for a hearing (T. Tr. 286-296).
 - (c) Defense cross-examination of Mrs. Ricketson regarding Jencks Act materials (T. Tr. 357-361) and Bench Conference and rulings denying defense motions (T. Tr. 361-362).
 - (d) Further defense cross-examination of Mrs. Ricketson regarding Jencks Act materials (T. Tr. 368-370) and Bench Conference and rulings precluding certain additional cross-examination (T. Tr. 370-374).
 - (e) Government closing argument (T. Tr. 853, 854, 857-861), closing argument on behalf of defendant Ware (T. Tr. 878), and Government rebuttal closing argument (T. Tr. 894-895).

Govt. H. Exh. 14

OFFICER
WILSON'S
Handwritten
NOTES



US ATT. SILBERT

BEST COPY AVAILABLE
from the original bound volume

①

ABOOT 2²⁴ P.M. 12-18-67

WHILE WORKING THE 8 AM - 4 PM

TOUR OF DUTY AND ASSIGNED TO

SCOOT 27, I WAS STOPPED AT

THE TRAFFIC LIGHT AT 10TH

MASSACHUSETTS AVE. N.W. WHEN

I HEARD A RADIO BUREAU

DISPATCHED TO 2 UNITS IN

#1 PCT. FOR A HOLDUP ALARM

AT 1115 EYE ST. N.W. I

IMMEDIATELY RESPONDED TO

THE AREA GOING SOUTH ON

10TH ST. AND WEST IN THE

1000 BLOCK OF K ST. N.W.

(7)
WHEN AT 11TH & K ST. I SAW
2 N/M SUBJECTS RUNNING
DIAGONALLY ACROSS K ST. FROM
THE MIDDLE OF THE BLOCK ON
THE SOUTH SIDE AND CONTINUE
NORTH ON ~~11TH~~ 11TH ST. AT THIS
TIME I ASKED THE DISPATCHER
FOR A DESCRIPTION OF THE
SUBJECTS WANTED BUT NO ONE
WAS AVAILABLE AT THIS TIME.
I WAS IN THE PROCESS OF
FLASHING A DESCRIPTION OF
THE SUBJECTS WHEN ONE
OF THEM STARTED ACROSS

3

11th ST. I PULLED THE
SCOOT CAR UP TO A
PARKED CAR AND BLOCKED
HIS PASSAGE. AT THIS TIME
THE SUBJECT, WHO WAS LATER
IDENTIFIED AS WILLIAM A.
HINES N/M 19 OF 906 K ST
N.W., CAME AROUND TO THE
RIGHT REAR DOOR OF THE
SCOOT CAR - OPENED IT - AND
SAT DOWN IN THE REAR
SEAT. AT THIS TIME I
ASKED WHAT HE WANTED
AND HE STATED "I'M JUST

④
TIRED" - I ASKED WHAT HE

WAS TIRED OF - AND HE STATED

"I'M TIRED OF RUNNING" - I

ASKED WHY HE WAS RUNNING

TO WHICH HE MADE NO REPLY.

I ADVISED THIS SUBJECT

THAT I WAS TAILING HIM

TO THE SCENE AS A

POSSIBLE SUSPECT IN A

ROBBERY TO WHICH HE MADE

NO OBJECTION. WHILE ENROUTE

TO THE SCENE A LOOKOUT

WAS FLASHED BY UNIT

FROM #1 PCT. WHICH FIT

5

THE DESCRIPTION OF THE
SUSPECT IN CUSTODY
AND THE OTHER SUBJECT
WHO WAS NOT APPREHENDED
UPON ARRIVAL ON THE
SCENE HE WAS IMMEDIATELY
IDENTIFIED BY ALL FOUR
OCCUPANTS OF THE REAL
ESTATE OFFICE AS
ONE OF THE 3 SUBJECTS
WANTED.

METROPOLITAN POLICE DEPARTMENT *Hines T. R. 4*

Washi. D. C.

STATEMENT OF FACTS

P.D. 163

| | |
|-----------------------|------------|
| C. C. R. NO. | 293-145 |
| PCT. C. NO. | 1-67-14024 |
| T. T. NO. | |
| DET. BUREAU SQUAD NO. | |
| X NO. | |

NAME AND RANK OF OFFICER HANDLING CASE IN COURT

Det. Sgt. Thomas P. Reilly & Pvt. Marshall W. Wilson

DISTRICT

C.I.D. & #2

CASE NO. 10356 #2

CHARGE

ROBBERY HOLD UP (ARMED -GUN)

NAME OF DEFENDANT

William Albert Hines
Theodore Michael WARE

ADDRESS

906 K st NW
#52 New York Ave N.W.

SEX

M

COLOR

Negro

AGE

19
20

DATE OF BIRTH

May 12, 1949

LOCATION WHERE OFFENSE OCCURRED

1115 Eye st NW

DATE AND TIME OF OFFENSE

Abt. 2:20 PM 12-18-67

LOCATION OF ARREST

1600 blk 11th st NW
906 K st NW

DATE AND TIME OF ARREST

2:28 PM 12-18-67
2:50 PM 12-18-67

STATEMENT OF FACTS BY OFFICER (INCLUDE ANY STATEMENT BY DEFENDANT):

About 2:20 PM Bart J Walshe, white, male 64 years, owner of the Walshe Realtors 1115 Eye st NW reports a negro, male entered the store and stated "Where is it", at this time complainant looked up and observed subject was holding a gun. At this time a second negro, male entered and followed the first subject behind the counter and they both went to the back room and as they came back into the front room the first subject told the complainant to lay on the floor. The above complainant layed down next to the desk in the front office and the other witness's were laying on the floor in the front of the first desk in office.

Petty Ricketson White, female 29 yrs an employee of the company was then ordered to place the money in a brown-paper bag which was thrown at her by the #1 subject. She then filled the bag and the subject ordered her to the safe in the rear of the office where the #2 subject was standing with Doris Boggs, white, female and taking the money from the safe and placing same in another brown paper bag. As both the complainant and the #1 defendant arrived at the safe a third subject entered the office and yelled "The Police are coming", the #1 and the #2 subject ran out the back room and thru window on the east side of the building and into the alley. The #3 (three) subject ran out the front door of the building.

Arresting officer was responding to the area in connection with the A.D.T. hold up alarm and observed two subjects fleeing the scene. At this time he gave chase in his scout car and in the 1000 block of 11th st he pulled the scout car abreast of a parked vehicle and stopped the subject William A Hines. Subject was positively identified by the complainant and the witness's.

Subject #2 Theodore Michael Ware, was arrested inside of 906 K st NW on the look out and at the time of his arrest he refused to identify himself to the Police or to make any statement. This subject was identified by the complainant and the witness's as the #2 subject in the hold up.

All money recovered on the scene. Total \$146.00.



WITNESSES

LIST THE NAME, ADDRESS AND STATEMENT OF EACH WITNESS.

| NAME (LAST - FIRST - MIDDLE) | SEX | AGE | ADDRESS | PHONE NO. |
|------------------------------|-----|-----|---------|-----------|
| WALSHE, Bart | M | 64 | | |

STATEMENT

| NAME (LAST - FIRST - MIDDLE) | SEX | AGE | ADDRESS | PHONE NO. |
|------------------------------|-----|-----|---------|-----------|
| RICKETSON, Betty | Fe | 29 | | |

STATEMENT

| NAME (LAST - FIRST - MIDDLE) | SEX | AGE | ADDRESS | PHONE NO. |
|------------------------------|-----|-----|---------|-----------|
| BOGGS, Doris | Fe | ? | | |

STATEMENT

| NAME (LAST - FIRST - MIDDLE) | SEX | AGE | ADDRESS | PHONE NO. |
|------------------------------|-----|-----|------------------|-----------|
| WILSON, Marshall FVT | | | M.P.D.C. # 2 Pct | |

STATEMENT

| NAME (LAST - FIRST - MIDDLE) | SEX | AGE | ADDRESS | PHONE NO. |
|------------------------------|-----|-----|----------|-----------|
| REILLY, Thomas P. Det. Sgt. | | | M.P.D.C. | |

STATEMENT

FINAL DISPOSITION OF CASE

(THIS STATEMENT MUST BE SIGNED BY THE OFFICER)

LC4

Thomas P. Reilly
 Det. Sgt. Thomas P. Reilly, C.T.D. 3080
 Signature

[Defense Cross-Examination of Mr. Gateau]

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THE COURT: Yes.

MR. GREEN: I have no further questions.

THE COURT: Mr. Valder?

CROSS-EXAMINATION

BY MR. VALDER:

Q Good morning, Mr. Gateau.

My name is Michael Valder.

Shortly after this robbery occurred, did a police officer ask you any questions who was investigating this case?

A There were several officers.

Q They were inside the store?

A Inside the office, yes, sir.

Q And they came almost immediately after the robbery?

A Yes, sir.

Q And they were asking you and the other people inside the store questions?

A Yes, sir.

Q And they were asking you to give a description as best you could of these people, to describe the robbers?

A Yes, sir.

Q As you were having this conversation with these police officers, was one or more of them taking notes in a little note pad?

THE COURT: If you recall.

THE WITNESS: I don't recall.

BY MR. VALDER:

Q Do you remember an Officer Casem -- C-A-S-E-M -- in this case?

A No, I don't recall.

Q Do you remember any of the officers' names in this case that were in the store asking questions?

A No, sir, I don't remember any of the names.

Q Is it because you didn't get the names at the time, or you don't remember?

MR. GREEN: I object, Your Honor.

He just answered the question. He said he didn't remember.

THE COURT: He said he didn't remember.

MR. VALDER: I was asking him if that was because he never got the names, or if he knew them at one time and had forgotten.

THE WITNESS: No, sir.

THE COURT: Does it make any difference? What is the relevancy? The answer is that he doesn't know.

Ask your next question, please, Mr. Valder.

BY MR. VALDER:

Q Mr. Gateau, do you remember an instance on this day, either during the afternoon shortly after the robbery or that evening or any other time, when you were being asked questions by a police officer, any police officer, and he was taking

some kind of notes while you were giving him answers?

A No, sir.

MR. GREEN: Your Honor, may we approach the bench, please?

THE COURT: Yes.

(AT THE BENCH:)

MR. GREEN: I submit that the line of questioning that he is pursuing is irrelevant and is not material to the issues here.

If you are looking for Jencks statements, I have told you that you have everything that I know of that exists.

MR. VALDER: Your Honor, Mr. Walshe just testified a few moments ago that Mr. Gateau and both Mrs. Boggs and Mrs. Ricketson were being asked questions and notes were being taken.

I have talked to Officer Frye, and if I have to, I will put him on the stand at this point for him to testify that he did take notes when descriptions were given before Mr. Hines was brought to the scene.

I think you understand the importance of this to my case, that description given by these witnesses before they saw Mr. Hines, before the confrontation, is quite crucial to my case.

THE COURT: Did this witness testify that he identified William Hines?

MR. VALDER: Your Honor, I know he didn't.

THE COURT: He has not identified William Hines?

MR. VALDER: That's correct.

THE COURT: All right. Why are you asking about it if he made no identification?

MR. VALDER: Your Honor, I don't want to waive my right to Jencks statements relating to the direct testimony of these individuals, because I have had a hard time.

THE COURT: Mr. Green has told you that you have everything that he has.

MR. VALDER: Your Honor, I don't think he knows of everything that was involved in this case.

THE COURT: All right. But you won't get it out of this witness.

MR. VALDER: Okay. Then can I call Officer Casem, Sgt. Reilly and Officer Frye to turn in any existing handwritten notes?

MR. GREEN: They are not even Jencks statements anyway, unless you prove that they are verbatim.

MR. VALDER: Then I can ask the witness if they are verbatim.

MR. GREEN: He just said he didn't remember.

MR. VALDER: I will ask the police officer.

MR. GREEN: He just said --

MR. VALDER: I am not bound by the answers of this

witness. I have the right to call the officers.

THE COURT: After this witness says he doesn't recall, you will have to probe more and more -- he says he doesn't recall -- it's been 18 months ago, and I would think --

MR. VALDER: I want the record to be clear on this. Some time at least one of these eyewitnesses gave descriptions to police officers before Mr. Hines came to the scene, and I don't know who it was. I have to determine with every witness whether he was the one. That is crucial evidence to me.

If I can establish that such an instant note description was given and obtain those notes and refresh the witness' recollection, that was the description he gave before Mr. Hines was brought to the scene -- I have substantial evidence in the record for this jury, and I want to make it clear, that is all, I want to establish the existence or non-existence of handwritten notes.

THE COURT: All right.

MR. VALDER: If we could call the police officers to do it if he can't remember.

THE COURT: You have no objection to that?

MR. GREEN: You are not calling the police officers in front of the jury?

MR. VALDER: No, this would be out of the presence of the jury.

THE COURT: Well, let's get on with it.

The point is that we have one witness at a time, and you find out what he knows.

MR. VALDER: I think we established everything else.

THE COURT: What's that?

MR. VALDER: As far as the Jencks statements are concerned, I don't have any other questions. He says he doesn't know.

THE COURT: All right.

(END OF THE BENCH CONFERENCE.)

THE COURT: Mr. Williams?

Had you concluded your examination, Mr. Valder?

MR. VALDER: Your Honor, just that phase, before continuing on, I think the matters we discussed at the bench should be looked into.

THE COURT: Well, you can call this witness back when it becomes appropriate, but we are not going to interrupt at this time.

MR. VALDER: All right, Your Honor. I will forego any cross-examination at this time with the right to recall him.

THE COURT: Very good.

MR. VALDER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Mr. Gateau, is it your testimony now that this

him by that chair as he moved into the office?

A Yes.

MR. GREEN: May I have the Court's indulgence for just one moment, please.

I have nothing further, Your Honor.

THE COURT: Mr. Williams.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q How soon after these men ran out of the office, Mrs. Boggs, did the police arrive?

A About fifteen or twenty minutes. I don't know the exact time, it was shortly thereafter. Maybe it could have been ten minutes.

Q You mean no policemen arrived sooner than ten minutes after these men left the office?

A Oh, I'm sorry. I misunderstood your question.

Q The first policeman who arrived after these three men left the office.

A They didn't--when you say left the office, they were still on the premises in the back room when the first policeman appeared at the door.

Q I see. What did that policeman do after he came in?

A He didn't come in. I said that I went to the door, and he told me to get down, and he went back out.

Q He went back out the front door of the office, the policeman?

A He actually never got into our immediate office. We have a hallway, and he went back down and out the front, I don't know.

Q Now, when did the next policeman come into the office?

A Well, they started coming in shortly thereafter. You know, they all had the call by this time.

Q What did they do when they came in shortly thereafter?

A Started asking questions.

Q Were they taking notes when they were asking the questions?

A Not at first, no, they were checking, actually checking, the Burglary Squad, you know, to look for them, like they usually do, I mean (indicating).

Q Did any of these police officers have their note pad book?

A Not at that time, not at the very beginning, I don't know. I don't know if you've ever been held up, first one car comes, another car comes, another squad, a detective agency, the Robbery Squad. They came there in different circles. Then they proceeded to get the story together.

Q All right. Now after they proceeded to get the



story together, did you see one of the officers or any of the police officers taking notes?

A The only one--I didn't actually see, I was questioned by one detective, I think, not a uniformed officer.

Q Not a uniformed officer?

A No, sir.

Q All right. Do you know who that detective is?

A I think it was Detective Reilly, which was later, when most of the policemen and everybody had gone, you know, just was three or four people there.

See, the money was discovered later, about an hour later, forty-five minutes to an hour later, and then I stayed in the front because in the meantime the telephone was ringing, and people were coming in to pay rent; and you are still taking care of complaint calls, so at this time you are helping the people.

So it could have been maybe an hour later, I don't know.

Q But Detective Reilly came up there in that office, and he had a note pad with him, and you sat down?

A I don't know if he had a note pad or a piece of paper and a pencil.

Q He had something, he was taking notes?

A Yes.

Q You were telling him about the events you have

related here?

A More or less, the highlights, yes.

Q He was taking notes down at that time?

A Yes.

Q In handwriting, I mean? He was writing with his hands, wasn't he?

A He was taking notes down, writing with a pencil on paper.

Q He wasn't sitting at one of the typewriters up there at the office, at one of the desks?

A No, they never have used a typewriter in all the holdups.

Q Do you recall talking to any other police officer and that police officer writing notes down?

A No.

MR. VALDER: May we approach the bench, Your Honor?

THE COURT: Yes.

(At the bench:)

MR. VALDER: Your Honor, I have some other questions on Jencks statements that I would like to ask, and we have already established that there have been some handwritten notes which haven't been produced, also some held-over Jencks inquiry with respect to Mr. Gateau.

And how would you like us to proceed?

I think that we should get all the Jencks statements before we cross-examine on the direct testimony.

THE COURT: Mr. Green, you made a statement earlier with respect to supplying these gentlemen with Jencks statements regarding prior witnesses.

What about this witness? Do you have any Jencks statements?

MR. GREEN: You should have everything that I have.

MR. VALDER: I have no handwriting.

MR. WILLIAMS: We specifically move for the handwritten notes.

MR. GREEN: Of Detective Reilly?

MR. WILLIAMS: Of Detective Reilly.

MR. GREEN: It is my information--I can only tell you what he told me--he doesn't have his handwritten notes.

MR. VALDER: I think we had better ask him.

MR. GREEN: Let's bring him in, bring him up to the bench and ask him.

THE COURT: All right. Let's get him.

(End of the bench conference.)

(At the bench, Thomas P. Reilly also present:)

THE COURT: Sergeant, the question which brings you here is whether or not you have any handwritten notes resulting in your interviews with any of the witnesses in this

case.

MR. REILLY: No. Everything that I have has been transcribed over into the regular PD forms.

THE COURT: That is PD Form 163?

MR. REILLY: 163 and the others you have.

THE COURT: And 251?

MR. REILLY: Yes, sir. As we make them, like on a sheet, like this.

MR. VALDER: Is that the 163?

THE COURT: 163 and 251.

MR. WILLIAMS: May I put a question to him?

THE COURT: Go ahead.

MR. WILLIAMS: Did you take a handwritten statement from Mrs. Boggs at the scene of the crime about an hour or so afterwards?

MR. REILLY: Other than notes, just general.

MR. WILLIAMS: You did?

MR. REILLY: Which we transcribed.

THE COURT: You threw them away after transcribing them?

MR. REILLY: Yes, sir. We make them into a form.

MR. VALDER: Ask which police statement?

What is the substance of those notes transcribed to?

MR. REILLY: It would be compiled into everything

as to what we used, the final writeup, which is what we make this from (indicating).

THE COURT: That is 163?

MR. REILLY: No, sir. This is what we call a writeup, a Robbery Squad form that we make just in conjunction with the robbery-holdups, and we make the complaint, whoever the owner of the business is, and then we compile everything in here as to what took place.

He's the complainant, then Mrs. Ricketson goes through generally what happened.

THE COURT: Those are compiled as a result of your handwritten notes?

MR. REILLY: Yes.

MR. VALDER: Do you have one for each witness?

MR. REILLY: No, just one writeup for the whole report.

MR. WILLIAMS: What is this? Is this a statement you wrote up from those notes?

MR. REILLY: Yes.

MR. WILLIAMS: This one?

MR. REILLY: This is the one that is made up in the office. In other words, when you have two or three informants and you have two or three officers, we make up, each of us, from one master, of course, what happened in general.

This is just a required form as to the line-up.

And this report goes into the line-up, so that when they are brought in the next morning, the man reading the roll call can read this over and say that this man did so and so.

MR. WILLIAMS: Who, for example, prepared this one?

MR. REILLY: I don't know. This is the one that I prepared here and signed.

This one doesn't have a signature on it. This I can't--

MR. WILLIAMS: This would be made from what notes, that form?

MR. REILLY: It would be made just from the statement of the officer, whoever made it up. In other words, he would be at one desk, and he would say what do you want to put in there, just basically what happened.

MR. WILLIAMS: The notes from Mrs. Boggs, where would they be incorporated in these forms?

MR. REILLY: They would fall into sequence.

In other words, what we try to do, is to compile everything into a sequence as to what took place.

MR. WILLIAMS: Betty Ricketson said this, and where is the one that says Doris Boggs says such and such?

MR. REILLY: There's nothing in here that says

Mrs. Boggs said anything in this report.

MR. WILLIAMS: Would you say you didn't take any notes?

MR. REILLY: We took notes from her, but they are compiled into the report.

MR. GREEN: Isn't it true that when you take your notes, when you get back there, that these police forms represent a summary or a collection of various people?

MR. REILLY: Everything.

MR. BOLOTIN: Let me ask one question:

Where in these forms is the description given by the victims of the subjects?

MR. GREEN: I will give them everything, they can take these forms. They have got all of these. They can have anything they want.

MR. WILLIAMS: Mr. Green, I don't want everything that is here. I want the original notes.

MR. GREEN: He said he doesn't have them.

MR. WILLIAMS: He destroyed them. I feel I have the right, under the Jencks Act, to have them.

MR. GREEN: I don't think so.

MR. WILLIAMS: I can't get the testimony because these notes are not produced.

MR. GREEN: He says he doesn't have them. They are not even Jencks statements.

MR. WILLIAMS: I think they are Jencks statements because they are close to being verbatim statements, as to what this witness was saying.

There is a mental process in transcribing them into the forms. There could be a mistake, and there could be damage to a defendant because of this mental process.

THE COURT: They are not available.

MR. WILLIAMS: I realize that they are not available, Your Honor, and I don't attribute any bad faith to the police or anyone else in destroying these notes, but I feel that the defendant has a right to these notes, and I therefore move to strike Doris Boggs' testimony because--

THE COURT: Well--

MR. VALDER: Before you rule, I haven't had a chance--these are not very good circumstances under which to have an argument, but not only do we have a question with respect to Mrs. Boggs, we are going to have questions with respect to the other witnesses, because I am quite certain that the record will show that there were handwritten notes being taken, not only by Officer Reilly but by other police officers on the scene. So that so far the testimony has been that these notes were destroyed, and there is no way for an officer to point to the typewritten reports and to indicate where in those reports the various statements by witnesses were given.

I will repeat that I also move to strike the testimony of Doris Boggs unless Officer Reilly can indicate in the typewritten reports the notes he took from her.

THE COURT: All right.

MR. GREEN: That puts a brand new burden on the police department.

THE COURT: There is no duty that they take anything down in note form.

MR. VALDER: That's right.

THE COURT: Or to keep the notes, either.

MR. GREEN: Yes.

THE COURT: There is a duty, if they have anything available in the form of reports which qualify under the Jencks Act, to supply them.

It is my understanding, from what Mr. Green says, that he has given you everything he's got.

MR. WILLIAMS: One other matter, Your Honor:

I would like to take up the matter--

MR. BOLOTIN: Before Mr. Williams goes on, I would like to say that I take the same position.

THE COURT: I am sure you do.

MR. BOLOTIN: I am particularly interested in having Mr. Reilly point out in his typewritten notes the descriptions given to him by the witnesses, which he transcribed--

MR. GREEN: Maybe he didn't even put them in there.

MR. VALDER: I think we have got to get some testimony from Officer Reilly, that is a formal statement.

Hearing?

MR. WILLIAMS: I intend to impeach Mrs. Boggs with a statement, one or the other of these prior inconsistent statements at the grand jury hearing, the first grand jury hearing, where she testified that a man told her to open the drawer of the safe, that that man was Ware. And at this pre-trial motion to suppress hearing she said that the man who told her to open the safe was the one who had the hat.

Now, as I understand her testimony, Ware was the man without the hat. And I've got impeachment material here.

I ask the Court's permission, if it becomes necessary to impeach her with the grand jury testimony, to be able to excise Ware's name and use the man without the hat for the purposes of impeachment, because of the in-court identification aspect of the use of the man's name, Ware.

THE COURT: Judge Youngdahl excluded her identification of Ware, didn't he? Was that because of photographs?

MR. GREEN: There has been no reference to him by name, nor has there been any identification made of him here in court.

MR. WILLIAMS: I wanted to try to keep that out.

THE COURT: I would think that you would leave well enough alone. You want your cake and you want to eat it, too.

MR. GREEN: She might say that, I don't know.

MR. VALDER: Your Honor, I will impeach her with that, because she has identified my man, and she claims that he was the one here at the safe. There is a prior inconsistent statement by her. And I won't be able to do that without it being brought before the jury that she would use the name Ware.

THE COURT: You can do that.

MR. VALDER: Instead of saying Ware, say man without a hat.

Your Honor, with respect to the Jencks statements in this case, I want the officer's testimony in the record. *Aspirin* We have just got a statement by Officer Reilly that he does not have his notes. I think we are entitled to know, not only from him, but I also suspect that Officer Frye took notes, and he took notes of the description given before Mr. Hines was brought back to the scene, that is the most crucial description, the most crucial handwritten notes in this case as far as I am concerned, and I want testimony that those notes have been destroyed.

I want testimony, as nearly as the officer can give it, as to where in the typewritten reports those descrip-

tions were transcribed.

THE COURT: All right. Those officers, I take it, are going to be witnesses?

MR. GREEN: Yes.

THE COURT: If you are suggesting that we have another hearing out of the presence of the jury before this witness or any other can proceed, why we won't do that. *Heard denied*

MR. VALDER: I would request that, Your Honor.

THE COURT: We will turn that down. You can always call a witness back.

(End of the bench conference.)

BY MR. WILLIAMS:

Q Now, Mrs Boggs, you testified that the second time these gentlemen came back, the men who were involved in this robbery came back to the safe, you were told, were you not, to open the safe or open the drawers of the safe by one of them?

A They did, yes, they tried--yes.

Q Which one of the men, either the man with the hat or without the hat told you to open that safe?

A The man without the hat.

Q The man without the hat.

Now, do you recall testifying at the motion to suppress last September before Judge Youngdahl of this Court about this same incident?

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Mrs. Ricketson, how soon after these three men left the office did you see or did the first police officer arrive in the office?

A The first police officer entered the front door during the noise of them going out the back.

Q Now, when you say entered the front, he came in the double doors here (indicating on the board)?

A In the double doors of the office.

Q Did he get past the counter?

Did he come past the counter?

A No, he didn't come past the counter.

Wait just a minute. If you don't mind, let me explain why I say he didn't. I'm sorry. I was behind the safe door.

Q You were behind the safe door?

A Yes.

Q You say the door to the safe -- they swing open like that?

A Yes, very large.

Q The safe and the doors swing open like this -- which door were you standing behind?

A Well, may I explain?

Q Go ahead. Yes, ma'am.

A When the third man yelled the police were coming, Mrs. Keelen and I got behind the door, when we saw the policeman come to our door, and the police officer said everybody on the floor.

Q When you say you got behind the door, you're talking about the safe door?

A The safe door.

Q This is the safe, it has a door over here and over here, and they swing.

This is the door you were back against, the wall there(indicating on the board)?

A Yes.

Q Not out in this area?

A No, no, behind the safe door, against the wall.

Q And you and Mrs. Keelen hit the dirt, hit the ground there?

A No, we didn't lay down, we were in a squatting position behind that safe door.

Q Behind that safe door?

A Yes.

Q All right. What did you see from behind the safe door?

What did this police officer do?

A I don't know, I couldn't see the police officer after he said everybody on the floor. We got back there, and that's where we stayed until we were given the okay that

everything was clear to get up.

Q After he said that, you dropped behind the door, then presumably he left the office, or you don't know what he did?

A Well, I don't know what he did.

Q Later on another officer came?

A Yes, there were other officers who came in.

Q What did they do when they came in?

A Well, from there on more than one officer had come at this time and entered the office, and some had went back to the office through the back of the office to see the window they had escaped from. Plainclothes detectives, I guess that's what you would call them, and others uniformed.

Q Was there an officer who came and talked to you about this incident, about the robbery?

A Yes, there was an officer.

Q Was he plainclothes, or did he have a uniform on?

A I talked to both.

Q The first one, was he plainclothes or uniformed that talked to you?

A Uniformed.

Q Did he have a little notepad with him when he was talking to you?

A Yes, I believe he did.

Q And was he taking down notes? Wasn't he?

A Not notes, the only thing I think was my name and address, not anything specific about it.

Q Not what you said?

A No, he just wanted my name and address.

Q Did he ask you about a description, about anybody?

A Yes.

Q Was it this officer that asked you about a description?

A I don't remember that.

Q Now, the next officer you saw, was this officer without a uniform, the next officer that talked to you?

A I don't know.

Q Was he also taking notes?

A I can't be specific about how many uniformed officers I talked directly to.

Q Well, while you were up there at the office, did any officer, any police officer, sit down with you and in long hand or somehow take a full statement from you about this incident?

A Yes, notes were made on what happened.

Q Do you remember who this officer was, the one that really took down complete notes up there at the office from you?

A Yes, it was Sergeant Reilly.

Q He took those notes in long hand, I mean, didn't sit down at a typewriter and type those notes, did he?

A No.

MR. WILLIAMS: Your Honor, may we approach the bench?

THE COURT: Yes.

(At the bench:)

MR. WILLIAMS: Your Honor, instead of going through the same argument that I went through before with Mrs. Boggs, I make the same point at this time that we move for the production of those handwritten notes supposedly taken by Officer Reilly, with the same argument. That's all I have to say.

THE COURT: All right. I think the record ought to show that Officer Reilly has previously been at the bench. He has testified that he took certain notes. That after taking certain notes, he incorporated them in a typewritten form. That after they were so incorporated, he destroyed the notes, and these notes are no longer available.

I will, therefore, overrule your objection and
note your exception.

MR. WILLIAMS: You will deny my motion?

THE COURT: That's right. I deny your motion.

MR. VALDER: I join in the motion, Your Honor.

I also think that this witness has indicated

that she gave a description to a uniformed officer who was there before Officer Reilly was there. And I think there ought to be an inquiry of the uniformed officer as to who that was.

THE COURT: That isn't the way I recollect her testimony. She said something about the officer only taking down her name and address.

MR. VALDER: Well, I will ask her when I cross-examine her.

THE COURT: All right.

(End of the bench conference.)

BY MR. WILLIAMS:

Q Now, Mrs. Ricketson, you never had seen any of these three young men who came into that office that day before, had you?

A No, sir, not to my knowledge.

Q And this is the first time in your life that you had ever experienced a robbery, wasn't it?

A Yes, it was.

Q And it is the first time in your life that you have ever had a pistol pointed at you, wasn't it?

A Yes, it was.

Q Consequently, you were pretty frightened, weren't you?

A Yes, I was frightened.

court on different occasions, haven't you?

A I think I know which one he is.

Q All right.

Did that officer--was he one of the first officers who came into the Walshe Realty Company right after this robbery had been completed?

A I can't say.

Q Did one of the first officers who came into that store ask you, you alone or all of you together, for a description so that he could broadcast it on his radio?

A I can't remember if he asked us altogether or one at a time.

Q But he did ask for a description?

A Yes, we were asked for a description.

Q And he got a description?

A Yes.

MR. GREEN: May I ask from whom? A description of whom?

MR. VALDER: All right.

BY MR. VALDER:

Q Did you give a description of the two men who were inside the store?

A Yes, we did.

Q All right.

MR. VALDER: Your Honor, I would like this

document marked Defendant's William Hines' Exhibit No. 2.

THE COURT: That is William Hines' Exhibit No. 2 marked for identification.

(Defendant William Hines' Exhibit No. 2, a document, was marked for identification.)

MR. GREEN: May we come to the bench, Your Honor.

(At the bench:)

MR. GREEN: Again, sir, I may be anticipating, but I would like to ask Mr. Valder to proffer to the Court just what use he is going to make of this radio report?

Now, the witness can testify, I think, perhaps to the description that she might have given, but as to compare it to what went out of the radio, I don't think she is competent to even go into that.

I don't see how she would even be concerned about this matter of the radio report.

MR. VALDER: I will very happily make such a proffer, Your Honor.

I am going to show Mrs. Ricketson the first lookout which was broadcast over the radio, and I am going to ask her if that was the description which was given to the first officer that got a description.

THE COURT: Well, I think you have got to tie

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in, first of all, what was the description given by her to the officers. And then you can ask her whether or not the description as given over the radio was the description that she gave.

MR. VALDER: All right. I will proceed in that way.

I will first ask you if the description she gave was the description she just gave on direct examination.

MR. GREEN: I am going to object vigorously, if I may say that, to any use of descriptions with respect to Officer Wilson and the men that were brought back to the scene, because these go only to probable cause, they do not go to the guilt or innocence of these defendants, what went out over the radio.

What Officer Wilson heard when he arrested this man is of no relevance, because probable cause has been decided by this Court, and it was held that probable cause existed.

As a result I am going to address very general questions to Wilson, that he heard a flash and made the arrest.

I am not sure that these descriptions, that these should be coming in at all for any ancillary purpose, otherwise than to ask the description.

MR. VALDER: I can understand Mr. Green's

concern about this description. I might also say that at the pre-trial hearing, Officer Frye testified that was the description which he broadcast, that he got his information from the women inside the store, and he was one of the first officers on the scene, that that was the description broadcast and obtained before Mr. William Hines was brought back to the scene.

Accordingly, it directly contradicts the description that Mrs. Ricketson has just given with respect to the two men inside the store.

MR. GREEN: Wait a minute. Officer Frye is in the hall, he hasn't been called here yet.

You can ask her what description she gave the police. You can't set up a straw man to impeach her.

You keep setting up a straw man with the radio report.

MR. VALDER: I want to make this clear:

I am going to ask her if the description that she gave to this officer was the description that she has given here in court.

If she says yes, I am going to show her this exhibit, No. 2, point out to her the first description broadcast, and ask her--

MR. GREEN: She has no control over that.

THE COURT: The officer can transmit anything

he wants. She doesn't have anything to do with it.

MR. VALDER: Can I reserve the right to recall her after the officer testifies?

THE COURT: I don't know about that. It seems to me that the person you should ask this question of is Officer Prye, or whoever made the report.

MR. VALDER: I understand. I intend to do so.

The order of witnesses in which the Government is presenting its case is now preventing my asking her about an exhibit which will be identified by a subsequent witness.

MR. GREEN: Mr. Valder, perhaps I can ask you, you don't have to answer, it's up to Judge Pratt, but of what relevance, if I may ask, of what relevance is the matter of the description that goes over the air? It should not enter into this case.

MR. VALDE : It goes right to the heart of this case, because it is a direct contradiction of the description which your witnesses have been giving this morning.

This is the first description, a description of William Hines before he was brought back to the scene. It was broadcast on the radio; we have got a written record of it.

MR. GREEN: There was probable cause to arrest him. It is irrelevant to any fundamental issue.

Now, you can ask her what description they gave, but I don't believe you should be permitted to set up a straw man by the radio report.

MR. VALDER: You can characterize it as a straw man.

THE COURT: It is a radio report over which she had no control. This is nothing like a prior statement of hers made before a grand jury or at a preliminary hearing, and you are trying to use it in just that way.

Ask her what description it was that she gave to the police, and to what policeman did she give it?

MR. BOLOTTN: Your Honor, one thought here: Wouldn't it be proper for Mr. Valder to read it to her, the description that went over the air, and ask her--

THE COURT: No. No.

MR. GREEN: No, just ask her what description she gave.

THE COURT: You get that from the policeman.

MR. GREEN: You get that from the policeman, you can cross-examine him.

MR. VALDER: Your Honor, I want to make sure that the record reflects that I did want to ask her about this, and it is quite clear that I am overruled.

THE COURT: All right.

MR. VALDER: Thank you.

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appears dark and delineated and why the latent print, it appears blotched and sketchy; that accounts for the material it's lifted on an ^a dusting and a variety of other factors which he explained to you during the course of his testimony.

Now there are some other circumstances in this case. We have an officer who arrived at the scene, Officer McFarland, and Officer McFarland tells us that as he comes out of 1115 I Street and goes around the alley, he sees two figures going by him in an easterly direction; one he thinks is wearing a hat and one he thinks is wearing a black coat. And ask yourselves whether it's just coincidental that at 9:06 P Street in an easterly direction minutes after advanced situation is found, Theodore Ware is wearing a black coat, all of whom at that moment, in that city, in that moment, he's in the home of William Hines minutes after this offense.

Let's talk about Edward Hines. After assessing the evidence as to each of the Defendants in this case, you are going to be asked to return a verdict with respect to these individuals. When you deliberate, you must keep them separate; you must think of them as separate entities when you assess the evidence. You have the testimony of Mrs. Boggs who says she got a good look at this man and Officer Wilson who testified he ran up the alley. He's identified by those two individuals. In addition to being charged with the robbery in this offense, ladies and gentlemen, he's charged with carrying a dangerous

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that is, carrying a weapon without a license to do so. Of course, we stipulated that he had no license. You will recall that the Government witnesses testified that they were armed during this robbery, Mr. William Hines and Theodore Ware were armed when they walked in by those gates and they will, or rather, they did testify that these two individuals never returned to the area of those gates or to the area of the chair where that pistol was found and having testified in that way, you may infer and conclude on the basis of that testimony that the only way that pistol could have gotten to that chair was to have been deposited there or placed there by the third man whose path took him right by there, that as you will remember on the chart when he entered that office, and the testimony of the witnesses the Government put on indicates that, that's just the route that the third man took when he entered into that office.

Now Mr. Ware took the stand. I'll not dwell extensively on his testimony. He has an obvious interest in the outcome of this case, one that I don't think has to be explained or even expanded upon, but I'll pause long enough to point out some contradictions in his testimony, some serious contradictions in his testimony. Perhaps the most noteworthy one is the contradiction which develops between his testimony and the testimony of Mrs. Hines as to just where he was when the knock at the door was heard. By that I mean the police knock. Now be guided by your own recollection of the testimony, but as I

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not forget that.

Now I want to talk to you about inconsistencies in testimony as to the witnesses. You have sat there a long time and particularly patient and you have heard a lot of evidence in this case. Now the Government appreciates your sincerity.

There has been inconsistencies between Witness A and Witness B. There's another type. Let's dwell on this one for a minute. As between any one witness and another witness, you must judge as to just how important the inconsistencies are. You must ask yourselves just how material are they. Are they that important that I should completely disregard them? Does the inconsistency I've heard make that witness untruthful? Does that destroy that witness's credibility? You're going to have to ask that with respect to two of these witnesses. There's a big inconsistency in the Government's case; we don't hide it. Mr. Gateau took this stand in the Government's case and was asked which of these Defendants was wearing a hat. Two of the Government witnesses said William Hines was wearing a hat and Mr. Gateau takes the stand and he's not sure, he thinks the -- at first, William Hines and then he points to Theodore Ware and then he thinks it's Mr. Ware. Ladies and gentlemen, this case is one and one-half years old. There's no escape, all of these witnesses for the Government testified before, testified at various preliminary hearings, Grand Jury hearing, and what have you, and I remind you as a very elementary observation, this

is not a play; these people are not actors in here that have lines to remember. They are not paid to speak with precision and never to forget a line or detail. Common people like yourselves and me when we testify over and over again to events, there's bound to be differences in testimony. When you consider their testimony, you must keep that in mind. It's like the old story you tell a friend, like telling a joke, telling the friend the same joke, the next day chances are you told it differently. Whether that's a basis for anyone to suggest whether you're untruthful, ladies and gentlemen, it's not. So you've got to think how important these legal inconsistencies were in the witness's testimony. Nothing, ladies and gentlemen, has been introduced in this trial to suggest that you should disregard the testimony of the witnesses of the Government that were introduced right from this standing, nothing what so ever.

Now, there's another kind of inconsistency in the case. That is the inconsistency that cropped up over and over again between what the witnesses said and the police version as it appears — their testimony as it appeared in the official forms. Let's look at the foundation of those official police forms. There has been no testimony in this case, this is my recollection, again, be guided by your own, but as I said, there's no testimony in this case that the police forms referred to by any of the witnesses were other than summary notes taken by these police officers in the course of their

investigation. Not one of the officers said he was taking word-by-word account from the people he talked to and the police one and one-half years later aren't able to tell us just whom they talked to when they entered 1115 I Street in the confusion that followed this holdup, nor were they able to locate official police forms as filled out a year and a half ago and know as to this lineup, "this was told to me by Mr. So 'n' So". So whether you think it's good police work or poor police work, that issue should not be in this case and must not be part of this case. You will remember Officer Wilson and Officer Riley took the stand and said they did take statements and their versions were made into official police reports. His testimony from the stand was that, that occasionally differs with officers in talking with various witnesses with different numbers assigned to different defendants and that the objective of the police when they prepare these papers for Court is to try to make sense of all these police papers or handwritten notes.

Now there has been some talk about the number three man and I don't remember when it occurred in the trial or which counsel -- Defense counsel brought it to your attention, but there's been some ado made about the number three man as it appears in the police report running out the front door. Ladies and gentlemen, we know that, that's wrong. Officer McFarland arrives on the scene, goes into the front door, he converses

with the people at the door and he goes around the back and there's number three man fleeing. If there was a man coming out the front door, he'd run smack into McFarland. We know there's mistakes in police forms, police report, but the point is, are you going to disregard the entire testimony of the witnesses who testified honestly and clearly about the events of that day here in court. The same current can/made with respect to the radio report. I won't keep you much longer, bear with me for a moment. Remember the radio report. Officer Frye takes the stand and he says after responding to that scene, his primary motivation was to get inside, get a description as fast as he could from a variety of witnesses, return to his car and grab that microphone and put that description over the air. Why? Because the Defendants were fleeing and the probability existed that they could be caught fleeing and the case brought to an early prosecution. He told you he was not motivated dwelling and staying with each of the witnesses inside to obtain an accurate description as possible, speed was of the essence. I believe that was his testimony.

So one of the issues in this case invariably as we come -- as I have emphasized before is whether that information contained in those reports, knowing how they were put together, what the atmosphere was at the scene of this offense, whether those police reports or the information therein is sufficient to discredit all the witness's testimony in this case.

and the fingerprint testimony or evidence in this case that applies to Defendant Theodore Marx.

Ladies and gentlemen, when you retire to the jury-room and consider your verdict, the Government asks that you return a verdict consistent with the evidence in this case and that in this case you find the Defendants guilty as charged.

Thank you.

THE COURT: Mr. Valder.

MR. VALDER: If your Honor please, good afternoon ladies and gentlemen of the Jury.

We're not claiming that the police did a bad job in this case, we're claiming that these three witnesses who came here and testified have made a mistake and they have made a bad mistake. They have identified three people, one of whom I'm particularly concerned about as his attorney, but they have identified three people as having committed a terrible crime and our defense, the defense of William Hines is that they are mistaken.

Now one of the last things that Mr. Green said was, he was talking about the mistakes in this case and he suggested that, perhaps, the atmosphere at the scene of this crime might explain why those mistakes were made. But let's not talk about he was referring to, let's talk about the mistakes, the big mistakes, the mistake about William Hines. Now what was the atmosphere at 1115 I Street, when Private Wilson brought William

Street, says he doesn't remember him going to the basement. As far as he can remember, he thought he went upstairs to the door. So the Government is refuting its own witnesses, its own argument.

Finally, the Defendant in this case took the stand. He doesn't have to take the stand, and when he takes the stand, he takes the stand like any other witness and puts his character and credibility in evidence and he puts himself in there and you're the judge as to whether he's telling the truth or not. To me, as far as I could tell, he was not contradicted; he was not contradicted in any significant way by the Government's cross-examination. He made, as you and I, if we were innocent, we would take the stand to try to exonerate ourselves and I don't believe he was contradicted and Mr. Ware was in no way contradicted; there weren't any great contradictions, any great discrepancies. There's one point in the testimony of the two, Mr. Ware and Mrs. Hines which I think give you sort of a key into one frame of mind as to whether the Defendant is guilty of this charge. Both he and Mrs. Hines testified when he came to her door, supposedly after this robbery had been committed, when he came to her door, she says, "Looks like my car is parked illegally over there." He walked, if you will recall, on the other side of this thing (indicating on diagram), he walked, on this diagram he walked from 906 K Street over to here and -- or here where Mrs. Hines said he

[Government Rebuttal Closing Argument]

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Now with respect to the fingerprint. Mr. Wallinger's suggestion that it was impossible for this man to leave his fingerprint. Well, it's as easy, I would suggest, that not only was it possible to leave his fingerprint, ladies and gentlemen, but the evidence shows that he did leave his fingerprint. Why he walked over to that desk and left his fingerprint there. Men don't think of these things during the offense. Now there's been some allusion that this fingerprint resided in the police folder for a long period of time. It's one of the facts in this case the police just let it lie there. Finally, a test was run on it by a man who we now know as an expert came in, a man who spent a great deal of time telling you about the fingerprint; he took painstakingly care to tell you; he went through it point-by-point explaining to you in just what way he arrived at his opinion. Surely, you can't reject his testimony. You can reject anyone's testimony in this case before you reject his testimony. Off hand, consider the he's race, consider the admissions he was asked to make. Take this right into the Juryroom with you, his analysis. He's done what he was trained for many, many years to do. Consider the analysis that he's done.

There's been some other talk about would a man
who's guilty do this; would a man who's guilty do that. Ladies and gentlemen, if guilty men wouldn't do some of these things, I need not remind you, we wouldn't have a trial. People are

[Foreman's Rebuttal Closing Argument]

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Now with regard to the fingerprints. Mr. Williams' suggestion that it was impossible for this man to leave his fingerprint. Well, it's as easy, I would suggest, that not only was it possible to leave his fingerprint, ladies and gentlemen, but the evidence shows that he did leave his fingerprint. Why he walked over to that desk and left his fingerprint there. Men don't think of these things during the offense. Now there's been some allusion that this fingerprint resided in the police folder for a long period of time. It's one of the facts in this case that the police just let it lie there. Finally, a test was run on it by a man who we now know as an expert care in, a man who spent a great deal of time telling you about the fingerprint; he took painstakingly care to tell you; he went through it point-by-point explaining to you in just what way he arrived at his opinion. Surely, you can't reject his testimony. You can reject anyone's testimony in this case before you reject his testimony. Off hand, consider the he's made, consider the admissions he was asked to make. Take this right into the Juryroom with you, his analysis. He's done what he was trained for many, many years to do. Consider the analysis that he's done.

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[Government & Rebuttal Closing Argument]

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not at the trial, at least, perhaps, when they're committing
crimes and are there, ladies and gentlemen, one thing has just
not been raised here by anyone. Time after time as they have
talked to you before, that's something that you just may not
consider to be a coincidence. And what is that? That is, as
this offense developed, this man that Mr. Valdes would have you
believe is out running for some ambiguous reason or some reason
whatsoever, this man was stopped to rest as the witness said
in the manner that they observed him when the offense occurred.
This man was brought back to the scene and identified there.
This man who has conversed with the policeman in a manner, at
best, suggestive of his guilt. This man has a friend, a close
friend who reports later is observed by a policeman in this
area (indicating on diagram) dressed as one of the other robbers
or holdup men and was described dressed the same way reports
later entering or seen at 900 K Street, Northwest, the home
of this other man. Now that alone, perhaps, is something that
you would not want to predicate guilt on, just that evidence,
but ladies and gentlemen, when you add that -- when you add
that to everything else that the Government has introduced in
this case, it makes it very unlikely that this was just a
coincidence, a matter of fate that this happened on that day
in December of 1967 and nobody has offered an explanation for
that, no one whatsoever and they cannot offer an explanation
for that.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,281

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES OF AMERICA

FILED DEC 6 1971

Vs.

WILLIAM A. HINES, Appellant

Nathan J. Friedman
CLERK

No. 23,391

UNITED STATES OF AMERICA

Vs.

THEODORE M. WARE, Appellant

PETITION OF APPELLANT THEODORE M. WARE FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC

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Pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, the Appellant Theodore M. Ware files this, his Petition for Rehearing and Suggestion for Rehearing in Banc.

POINTS IN SUPPORT OF PETITION

I. Appellant Ware's arrest was unlawful because it was made without probable cause therefor and without



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POINTS IN SUPPORT OF PETITION

I. Appellant Ware's arrest was unlawful because it was made without probable cause therefor and without



a warrant. In deciding the questions of probable cause and necessity for a warrant the Court overlooked certain evidence in the record.

II. Appellant Ware was affirmatively misled by the Government concerning fingerprint evidence, and was thereby prejudiced in his substantial rights. In considering the point, the Court misapprehended the record.

III. The Court misapprehended the evidence concerning the destroyed Officers' notes in concluding that they were not "substantially verbatim" statements within the meaning of the Jencks Act, 18 USC 3500(e)(2).

ARGUMENT

I. APPELLANT WARE'S ARREST WAS UNLAWFUL BECAUSE IT WAS MADE WITHOUT PROBABLE CAUSE THEREFOR AND WITHOUT A WARRANT. IN DECIDING THE QUESTIONS OF PROBABLE CAUSE AND NECESSITY FOR A WARRANT THE COURT OVERLOOKED CERTAIN EVIDENCE IN THE RECORD.

Detective Ianigan, the arresting officer, went to the Hines home on the suspicion that Edward Hines, brother of William Hines, may have been involved in the robbery (ST 155; Ware Brief, p. 8). The Government admits that Detective Ianigan did not have probable cause to arrest Ware when he left the robbery scene for the Hines house (Govt. Brief, p. 17).

The Court felt, however, that the independent convergence of Officer Frye and Detective Ianigan at the



Hines residence helped supply probable cause. (Opinion, pp. 14 and 15). The information, therefore, possessed by Officer Frye and conveyed to Detective Lanigan is of considerable importance and was viewed as such by the Court.

Officer Frye, after having broadcast a lookout for the suspects, drove around the area and parked in front of Mrs. Hines residence (ST 155; Ware Brief, p. 8). Ware was standing in front of the house talking to Mrs. Hines; he was not seen to act in a suspicious manner; he made no attempt to flee whatsoever. Frye watched Ware for three or four minutes (Frye's own estimate) until he went into the house with Mrs. Hines. During the time that Frye sat and watched Ware and Mrs. Hines, and thereafter until such time that Detective Lanigan and the other officers arrived, Officer Frye neither said nor did anything to indicate that he was suspicious of Ware. Frye testified that he intended to call on the radio, but the fact is that he did nothing during the period in question. (ST 257-8; Ware Brief, pp. 9, 10 and 30).

What similarities existed between the descriptions broadcast by Officer Frye, and the man Frye saw in the yard talking to Mrs. Hines? Frye had described a man wearing a white shirt, tie, dark suit, and dark pants, but conceded at trial that he noted none of these distinguishing things about Ware (Opinion, pp. 6 and 7). According to Lt. Wallace who accompanied Detective Lanigan, "All [Frye] said was he saw a negro male with a black raincoat go in the



house with a green door." (ST 162). Frye gave no height or weight description. (ST 163).

Appellant Ware contends that there was nothing significant about a man wearing a raincoat on a rainy day. The Court perceived the record to be otherwise concerning rain on the day in question and attached equal if not greater and opposite significance to Frye's sighting a man wearing a black raincoat, saying as follows:

However, we can assume that Officer Frye noticed that appellant Ware matched the height, weight, and age descriptions emphasized in the radio run as well as the fact that he was a Negro male wearing a black raincoat. Appellant Ware, in his brief, attempts to disparage the significance of the black raincoat, stating that because it was raining on the day in question such a raincoat would certainly not be a distinguishing characteristic. However, we have carefully examined the record and we find no indication that it was raining on December 18, 1967. (Opinion, p. 7).

Appellant Ware respectfully invites the Court's attention to the following uncontroverted testimony on the point:

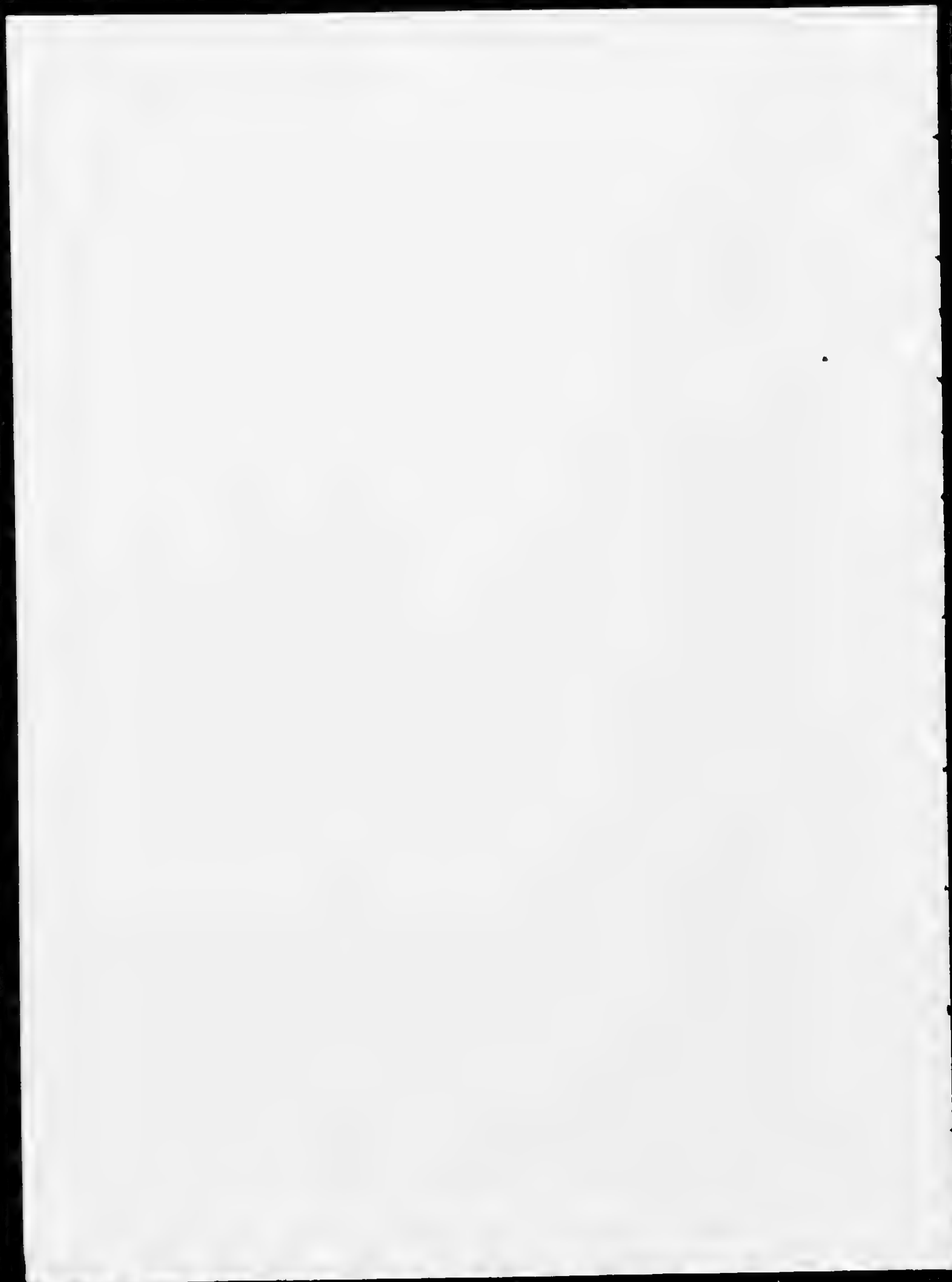
Mrs. Hines testified about the events prior to the entry of Detective Lanigan and the other officers into her home:

Q And when Mike came in he had on a black rain coat, didn't he?

A I don't recall what Mike had on but it was raining a little.

Q You recall how he was dressed?

A No, I was so sick and weak, he was holding an umbrella over me and told me to go lie down. (ST 147, emphasis added).



The Appellant testified as follows concerning the same events on the day in question:

Q ...After Mrs. Hines came down, came outside, what happened then, Mr. Ware?

A I walked with her to the car. She opened the car and took an umbrella out of there because it started raining.

Q It started raining at this time?

A Yes. (T 697, emphasis added).

The officers left the robbery scene looking for Edward Hines on Detective Lanigan's admitted hunch, and they gained entry to Mrs. Hines home without her consent (Opinion, p. 17) to find Edward Hines. (ST 143 and 161).

The foregoing results in less than probable cause, and much less than that required to justify the entry by officers into a private home without consent and without a warrant.

II. APPELLANT WARE WAS AFFIRMATIVELY MISLEAD BY THE GOVERNMENT CONCERNING FINGERPRINT EVIDENCE, AND WAS THEREBY PREJUDICED IN HIS SUBSTANTIAL RIGHTS. IN CONSIDERING THE POINT, THE COURT MISAPPREHENDED THE RECORD.

In setting forth the facts relating to the fingerprint evidence, the opinion recites that,

[I]t was learned immediately before trial that the Ware fingerprints had never been compared with the fingerprints found at the scene of the robbery. At that time, the prosecutor, who discovered the foul up in his preparation for trial, asked the police department to examine the fingerprints found at the scene with those of appellants Hines and Ware. (Opinion, p. 11).

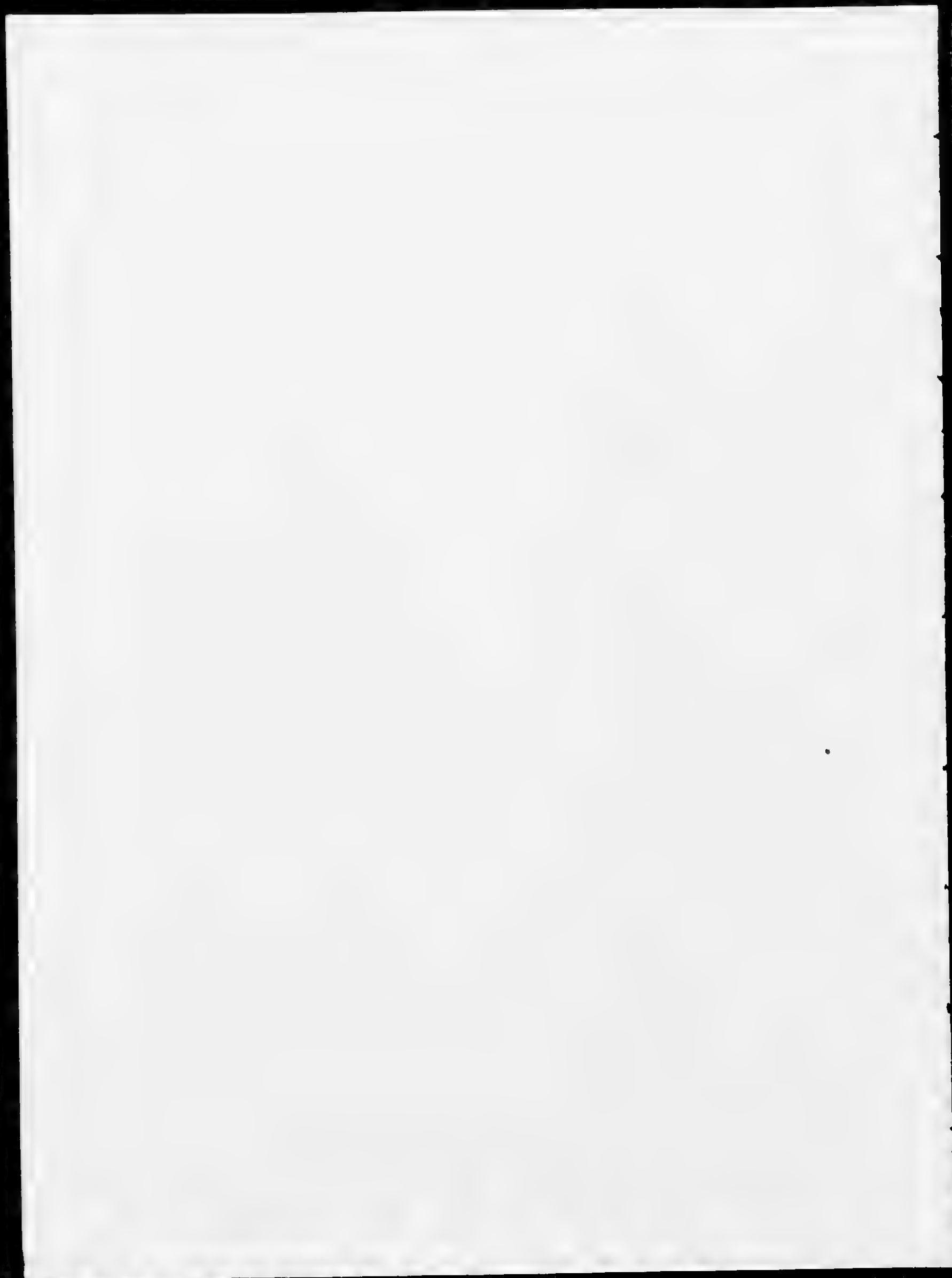


However, the testimony of Officer Reilly at the preliminary hearing was to the effect that (a) latent fingerprints had been found at the scene of the crime, (b) a comparison had been made with fingerprints of Hines and Ware, (c) the latent prints were not those of Hines, and (d) the latent prints were not those of Ware. (Preliminary Hearing Transcript, pp. 23-4; Ware Brief, p. 21). Officer Reilly was in charge of the case, and described his investigation as "very thorough", exhaustive" and "complete". (T 533; Ware Brief, p. 22). He could not have testified to the affirmative fact had the fingerprints not been compared. Had the prints not been compared at the time of the preliminary hearing Officer Reilly would have testified differently.

It is not a "last minute discovery" (Opinion, p. 30) of which Appellant Ware complains; rather it is the fact that the Government affirmatively mislead him in the preparation of his case for trial. The Government's "foul up" is Appellant's denial of substantial rights. As stated by the Supreme Court in construing a state notice-of-alibi statute,

The adversary system of trial is hardly an end to itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. *Williams v. Florida*, 399 U.S. 78 (1970).

Appellant Ware asked for dismissal of the case when advised of existence of fingerprint evidence at trial



(on Sixth Amendment grounds) (T 5), and for an opportunity to examine the prints with an expert (T 37). The Trial Court permitted examination of the prints after the Government had finished with them, with the caveat that there be no delay of the trial. (T 39). Trial counsel did all that he could under the circumstances. However, under circumstances which should have existed, being those required for due process of law, and at a minimum, those in keeping with the standards required for the fair administration of criminal justice in the Federal courts, trial counsel would have been given the opportunity by way of advance preparation for an expert to make a proper and detailed examination of the prints in question, and thereafter to advise and counsel with him. He would have been able to better focus on the important role played by Officer Reilly and would no doubt have not excused him as a witness upon the Government's request for a stipulation (T 614); he would have been able to carefully examine the witness Clayton E. Keys who can be described from the record as painstaking in his work, concerning the fact that while Mr. Keys took and filed the latent prints and later in the day took and filed the prints of Ware, he did not connect the two as being from one and the same person.

Appellant Ware's rights were substantially prejudiced by reason of the Government's conduct in affirmatively misleading him.



III. THE COURT MISAPPREHENDED THE EVIDENCE CONCERNING THE DESTROYED OFFICERS' NOTES IN CONCLUDING THAT THEY WERE NOT "SUBSTANTIALLY VERBATIM" STATEMENTS WITHIN THE MEANING OF THE JENCKS ACT, 18 USC 3500(e)(2).

In applying the rule set forth in United States v. Augenblick, 393 U.S. 348 (1969), first enunciated in Palermo v. United States, 360 U.S. 343 (1959), the Court found the destroyed notes to have been truncated and to have covered less than the entire interviews to such an extent that they were not "substantially verbatim" under Section (e)(2) of the Jencks Act, 18 USC 3500. (Opinion, pp. 26 and 27).

The notes in Augenblick, supra, were apparently sketchy (their precise nature was never determined since under the express holding of the Supreme Court it was not necessary to do so), taken while a complete tape recording was being made of a 20-25 minute interview. See Augenblick v. United States, 377 F.2d 586, at 596 (Ct. of Claims, 1967). The notes in Palermo, supra, were a revenue agent's 600 word summary of a 3½ hour conference. This case simply does not involve summaries of lengthy interviews.

The testimony of Mrs. Ricketson is very much at issue since she was the only identifying eye witness of Ware at trial. Mrs. Ricketson gave a brief statement to Officer Reilly, of which he made notes (ST 207; T 360; Ware Brief, p. 42). Officer Reilly transcribed his notes, along with the other officers, onto a Police Department



form, then most all of the notes were destroyed. Officer Wilson was the only one to keep his notes. (T 288-9; Ware Brief, pp. 42-5). The police form became an amalgamation of statements and no officer could tell which witness had said what (T 504; Ware Brief, p. 43) except for Officer Wilson who was able to identify a particular part of one of the forms as being his contribution thereto (T 450; Ware Brief, p. 43).

The witnesses statements were admittedly brief; the destroyed notes were evidently brief.^{/1} Not all of the notes, brief as they may have been, were carried over into the police forms inasmuch as a selection process was performed by the officers in compiling the amalgamated report. (T 290, 424; Ware Brief, pp. 42-3). However, notes of brief conversations are not prescribed by the Jencks Act.

The fact of the matter is that the Trial Court did not reach the point of making an express finding as to the scope of the notes, i.e. whether or not they were "substantially verbatim" statements, since in its view the existence or not of the original notes was the decisive

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An examination of Officer Wilson's notes indicates a substantially complete declaration of events. The notes were delivered to opposing counsel at trial, presumably because of Section (e)(1) of the Jencks Act (T-444); however, this section was not applied so as to require production of any other officer's notes after such officers direct examination by the Government, e.g. Officer Casem (T 418); Officer Reilly (T 410).



factor. The District Court felt that there was no duty to preserve the original notes, ruling as follows:

THE COURT: There is no duty that they (the police) take anything down in note form.

MR. VALDER: That's right.

THE COURT: Or to keep the notes, either.

MR. GREEN: Yes.

THE COURT: There is a duty, if they have anything available in the form of reports which qualify under the Jencks Act, to supply them. (T 293, emphasis supplied).

The Government urged the District Court's ruling on this Court. (Govt. Brief, pp. 27 and 28). However, as this Court has ruled in United States v. Bryant, _____ U.S. App.D. C. _____, 439 F.2d 642 (1971), a determination has to be made concerning "degree of negligence" or "bad faith" involved in the destruction. Prospectively, the rule of Bryant, supra, is much more severe.

In the case at hand, the District Court failed to make a precise factual determination as to whether or not a statement is within the Jencks Act after taking testimony and other evidence, as required by the Supreme Court in Campbell v. United States, 365 U.S. 85 (1961). However, with destruction having intentionally taken place, it is submitted that such a hearing would be to no avail. The Government should bear the burden of the presumption that the material was in fact under the Jencks Act, going next to the further determination



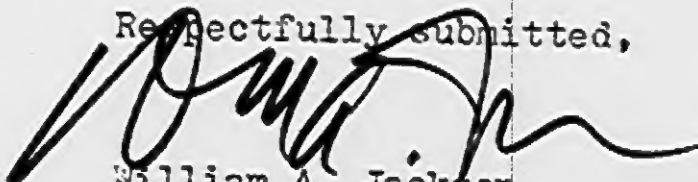
required under the rule of Bryant applicable to this case concerning "bad faith" and negligence". It is further submitted that the record speaks for itself, and intentional destruction should be equated with negligence. The sanctions under the Jencks Act should be applied.

CONCLUSION

The Appellant respectfully suggests, particularly because this Court's ruling concerning the Jencks Act departs substantially from the rule of the Bryant case, supra, that this appeal be reheard by the Court of Appeals in banc.

WHEREFORE, Appellant Theodore M. Ware requests that his petition be granted, and that on rehearing the judgment of conviction be reversed.

Respectfully submitted,



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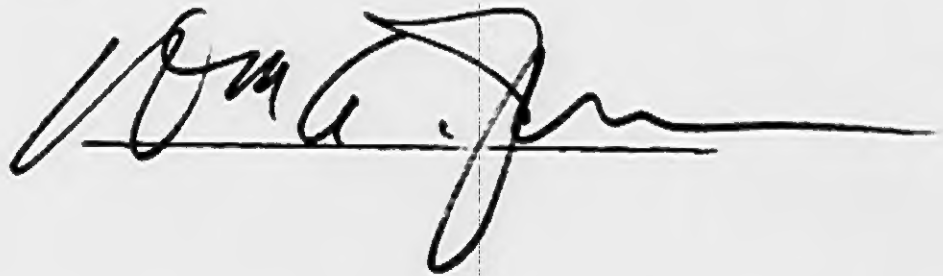
Counsel for Theodore M. Ware
(Appointed by this Court)



CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this date caused to be mailed to the United States Attorney for the District of Columbia, United States Courthouse, Washington, D. C., and to Michael J. Valder, Esq., Federal Bar Building, Washington, D. C. two copies of the within petition.

Signed, December 3, 1971.

A handwritten signature in dark ink, appearing to be "B. A. J.", written over a horizontal line.